(14)

No. 22O128 ORG
Title: State of Alaska, Plaintiff
v.
United States of America
Docketed: November 24, 1999

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 24 1999	Motion for leave to file a bill of complaint filed.
Jan 24 2000	Order extending time to file response to motion for leave to file a bill of complaint until February 28, 2000.
Feb 25 2000	Order further extending time to file response to motion for leave to file a bill of complaint until March 29, 2000.
Mar 29 2000	Order further extending time to file response to motion for leave to file a bill of complaint until April 12, 2000.
Apr 12 2000	Brief for the United States filed.
Apr 25 2000	DISTRIBUTED for Conference of May 11, 2000.
Apr 25 2000	Reply brief filed.
May 23 2000	REDISTRIBUTED for Conference of June 8, 2000.
Jun 12 2000	Motion for leave to file a bill of complaint is GRANTED. Motion for leave to file a bill of complaint is granted. The United States is allowed 60 days within which to file an answer.
Aug 9 2000	Order extending time to file answer to bill of complaint until August 25, 2000
Aug 25 2000	Answer of United States to bill of complaint filed.
Sep 13 2000	DISTRIBUTED for Conference of October 6, 2000.
Oct 10 2000	REDISTRIBUTED for Conference of October 13, 2000 (page 14).
Oct 16 2000	IT IS ORDERED that Gregory E. Maggs, Esquire, of Washington, D.C., be appointed as Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings to direct subsequent proceedings, with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such Reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the costs of printing his Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.
Oct 17 2000	Oath of Special Master filed.
Dec 14 2000	Motion of Alaska for leave to file an amended complaint filed.
Dec 20 2000	Memorandum of respondent United States filed.
Dec 20 2000	Motion to amend complaint DISTRIBUTED (Jan 5, 2001)
Jan 8 2001	Motion of Alaska for leave to file an amended complaint GRANTED, and the United States is allowed 30 days in which to file an answer.
Feb 7 2001	Answer to amended complaint filed.
Feb 14 2001	DISTRIBUTED for Conference of March 2, 2001 (page 4).
Feb 22 2001	Motion of Franklin H. James, et al., for leave to intervene as defendants filed.
Mar 1 2001	Order extending time for parties to file responses to motion of Franklin H. James, et al.

	for leave to intervene extended until April 4, 2001.
Mar 5 2001	Amended complaint and answer referred to the Special Master.
Apr 4 2001	Opposition of Plaintiff to motion of Franklin H. James, et al. for leave to intervene and file answer filed.
Apr 4 2001	Brief of the United States in opposition to movants' motion for leave to intervene and file answer filed.
Apr 11 2001	DISTRIBUTED for Conference of April 27, 2001.
Apr 16 2001	Motion of Special Master for fees and reimbursement of expenses filed. (NP)
Apr 17 2001	Motion DISTRIBUTED for Conference of May 10, 2001.
Apr 18 2001	Reply brief in support of motion to intervene filed.
Apr 19 2001	Letter from the Solicitor General indicating no objection to the motion of the Special Master filed and distributed.
Apr 23 2001	Letter from the State of Alaska indicating no objection to the motion of the Special Master filed and distributed.
Apr 30 2001	Motion of Franklin H. James, et al. for leave to intervene is referred to the Special Master.
May 14 2001	Motion of the Special Master for fees and reimbursement of expenses is granted, and the Special Master is awarded a total of $12.963.14 for the period October 6, 2000- April 16, 2001, to be paid equally by the parties.
Oct 16 2001	Motion of Special Master for fees and reimbursement of expenses filed.
Oct 17 2001	Motion DISTRIBUTED for Conference of November 2, 2001.
Oct 19 2001	Letter from the United States indicating no objection to the Motion of the Special Master filed and distributed.
Oct 26 2001	Letter from the State of Alaska indicating no objection to the motion of the Special Master filed and distributed.
Nov 13 2001	ORDER: Motion of the Special Master for fees and reimbursement of expenses is granted, and the Special Master is awarded a total of $20,136.90 for the period April 17 - October 16, 2001, to be paid equally by the parties.
Nov 26 2001	Report of the Special Master on motion to intervene by Franklin H. James, et al. filed.
Dec 5 2001	Motion DISTRIBUTED for Conference of January 4, 2002 (page 13).
Jan 7 2002	Motion REDISTRIBUTED for Conference of January 11, 2002 (page 11).
Jan 14 2002	Report of the Special Master on the motion of Frank H. James, et al. for leave to intervene is received and ordered filed. The motion of Frank H. James, et al. for leave to intervene is denied.
Apr 17 2002	Motion of the Special Master for fees and reimbursement of expenses filed.
Apr 22 2002	Letter from the State of Alaska indicating no objection to the motion of the Special Master filed and distributed.
Apr 25 2002	Letter from the Solicitor General indicating no objection to the motion of the Special Master filed and distributed.
May 13 2002	ORDER: Motion of the Special Master for fees and reimbursement of expenses is granted and the Special Master is awarded a total of $20,112.75 for the period October 17, 2001 through April 16, 2002, to be paid equally by the parties.
Oct 24 2002	Motion of Special Master of the Special Master for Fees and Reimbursement of Expenses for the Period April 17, 2002 through October 16, 2002 filed.
Oct 30 2002	Motion DISTRIBUTED for Conference of November 15, 2002 (page 5).
Nov 1 2002	Letter from the Solicitor General indicating no objection to the motion of the Special

	Master filed and distributed.
Nov 8 2002	Letter from the State of Alaska indicating no objection to the Motion of the Special Master filed and distributed.
Nov 18 2002	ORDER: Motion of Special Master for fees and reimbursement of expenses is granted and the Special Master is awarded a total of $86,070.21 for the period April 17, 2002 through October 16, 2002, to be paid equally by the parties.
Apr 24 2003	Motion of Special Master for fees and reimbursement of expenses for the period October 17, 2002 through April 16, 2003 filed.
Apr 25 2003	Letter from the Solicitor General indicating no objection to the motion of the Special Master filed and distributed.
May 4 2003	Letter from the State of Alaska indicating they have no objection to the Motion of the Special Master for Fees and Reimbursment of Expenses.
May 6 2003	DISTRIBUTED for Conference of May 22, 2003.
May 27 2003	Motion of Special Master for fees and reimbursement of expenses for the period October 17, 2002 through April 16, 2003 GRANTED.
Oct 20 2003	Motion for fees and reimbursement of expenses for the period April 17, 2003 through October 16, 2003 filed by Special Master.
Oct 27 2003	Letter from the State of Alaska indicating they have no objection to the Motion of the Special Master for Fees and Reimbursment of Expenses.
Oct 30 2003	Letter from the United States indicating they have no objection to the Motion of the Special Master for Fees and Reimbursment of Expenses
Nov 5 2003	Motion DISTRIBUTED for Conference of November 26, 2003.
Dec 1 2003	Motion for fees and reimbursement of expenses for the period April 17, 2003 through October 16, 2003 GRANTED.
Mar 30 2004	Report of the Special Master submitted
Apr 20 2004	Motion for fees and reimbursement of expenses for the period October 17, 2003 through April 19, 2004 filed by Special Master.
Apr 23 2004	Letter filed by the United States stating no objection to the Motion of the Special Master for Fees and Reimbursement of Expenses
Apr 26 2004	Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days.
May 3 2004	Letter filed by Alaska stating no objection to the Motion of the Special Master for Fees and Reimbursement of Expenses
May 4 2004	Motion DISTRIBUTED for Conference of May 20, 2004.
May 18 2004	Time to file exceptions to the Report of the Special Master extended to and including July 12, 2004 for all parties
May 24 2004	Motion for fees and reimbursement of expenses for the period October 17, 2003 through April 19, 2004 GRANTED.
Jul 12 2004	Exceptions to Report of Special Master and Brief in Support for Plaintiff State of Alaska filed.
Jul 29 2004	Time to file a reply to Alaska's exceptions to the Report of the Special Master extended to and including September 10, 2004.
Sep 10 2004	Reply brief of United States in response to exceptions of the state of Alaska filed.
Sep 10 2004	Brief amicus curiae of National Parks Conservation Association in support of United

	States with respect to Count IV, Glacier Bay filed.
Oct 8 2004	Motion to file sur-reply filed by petitioner State of Alaska.
Oct 13 2004	Motion DISTRIBUTED for Conference of October 29, 2004.
Oct 18 2004	Reply of respondent United States of America in opposition to the motion of the state of Alaska for leave to file a sur-reply filed. (Distributed)
Oct 21 2004	Reply in support of motion of plaintiff State of Alaska for leave to file sur-reply filed. (Distributed)
Nov 1 2004	Motion to file sur-reply DENIED.
Nov 1 2004	The Exceptions to the Report of the Special Master are set for oral argument in due course.
Nov 12 2004	SET FOR ARGUMENT ON Monday, January 10, 2005.
Jan 10 2005	Argued. On exceptions to the report of the Special Master. For plaintiff: Jonathan S. Franklin, Washington, D.C. For respondent: Jeffrey P. Minear, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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No. —, Original

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF ALASKA,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ALASKA'S MOTION FOR LEAVE TO FILE A COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION

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IN THE

Supreme Court of the United States

No. ——, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MOTION FOR LEAVE TO FILE A COMPLAINT

Pursuant to S. Ct. Rule 17, the State of Alaska, through its Attorney General, asks leave of the Court to file a complaint against the United States to quiet title to the lands underlying marine waters in Southeast Alaska. This motion is accompanied by a complaint and supporting brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. ——, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT TO QUIET TITLE

The State of Alaska, plaintiff, alleges as follows:

1. This is an action to quiet title to the tide and submerged lands in Southeast Alaska. These include the submerged lands within the Alexander Archipelago of Southeast Alaska that are enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration, together with the submerged lands extending three miles seaward from that line and from the remainder of Southeast Alaska's coast line. The lands that are the subject of this action are shown on the map at Exhibit ("Ex.") 1.*

2. This Court has jurisdiction under Article III, Section 2, Clause 2, of the United States Constitution and 28 U.S.C. § 1251(b)(2).

3. The United States consented to this action in 28 U.S.C. § 2409a(a). Alaska gave the United States written

* Exhibits referenced herein are appended to the accompanying Brief in Support of Motion for Leave to File a Complaint.

notice of its intent to file suit to quiet title to these lands on or about August 21, 1998, and March 22, 1999, as required by 28 U.S.C. § 2409a(m).

Count I: Historic Waters of the Alexander Archipelago

4. Upon admission to the Union on an equal footing with the other States, a new State succeeds to the United States' title to lands underlying navigable inland waters within its boundaries as an incident of its sovereignty.

5. Alaska was admitted to the Union "on an equal footing with the other States in all respects whatever" on January 3, 1959. Alaska Statehood Act § 1, Pub. L. No. 85-508, 48 U.S.C. note prec. § 21.

6. Under the equal footing doctrine, Alaska succeeded to the United States' title to lands underlying navigable inland waters within Alaska's boundaries as an incident of statehood.

7. From at least 1903 until 1971, the United States took the position in its international relations and in litigation with the States in this Court that the waters of the Alexander Archipelago were inland waters, including the pockets and enclaves that are more than three miles from the coast line of the mainland and any of the islands enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration (hereinafter "pockets and enclaves"). These pockets and enclaves are depicted in red on the map at Ex. 1.

8. Foreign nations acquiesced in the United States' claim that the waters of the Alexander Archipelago were inland waters, including the pockets and enclaves.

9. All of the submerged lands within these pockets and enclaves underlie navigable historic inland waters.

10. Because all of the submerged lands within the pockets and enclaves underlie navigable historic inland waters, Alaska took title to them upon its admission to the Union under the equal footing doctrine.

11. Congress both confirmed the equal footing doctrine rule of state ownership of lands underlying navigable inland waters and quitclaimed to the States the offshore submerged lands within state boundaries in the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315.

12. Congress made the Submerged Lands Act applicable to Alaska in Section 6(m) of the Alaska Statehood Act.

13. Congress defined Alaska's boundaries as coextensive with the three-mile territorial sea claimed by the United States at the time of Alaska's admission to the Union on January 3, 1959.

14. The United States claims an interest in the submerged lands within the pockets and enclaves, and also claims the submerged lands extending three miles seaward of the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration (hereinafter "1903 closing lines") where the submerged lands are more than three nautical miles from any point on the coast line of the mainland or any of the islands. The latter areas are depicted in dark blue on the map at Ex. 1.

15. Because the submerged lands within the pockets and enclaves and extending three miles seaward of the 1903 closing lines passed to Alaska at statehood under the equal footing doctrine and the Submerged Lands Act, the United States has no right, title, or interest in those lands.

16. On or about September 10, 1907, President Theodore Roosevelt reserved by proclamation an area of Southeast Alaska as the Tongass National Forest.

17. In 1908, President Theodore Roosevelt consolidated the Tongass National Forest with the Alexander Archipelago Forest Reserve and named the new entity Tongass National Forest.

18. On or about February 16, 1909, President Theodore Roosevelt enlarged the Tongass National Forest.

19. On or about June 10, 1925, President Calvin Coolidge again enlarged the Tongass National Forest. *See* Ex. 2 (map with the 1925 enlargement and resulting outer boundaries of the Tongass National Forest).

20. Although the pockets and enclaves and the submerged lands extending three miles seaward of the 1903 closing lines are within the outer boundaries of the Tongass National Forest shown on the map at Ex. 2, the reservation of lands within these boundaries did not reserve the submerged lands therein or defeat Alaska's title to them at statehood.

21. Alaska's title is adverse to and clouded by the United States' claim of title to the lands underlying the pockets and enclaves and the waters extending three miles seaward of the 1903 closing lines where the submerged lands are more than three miles from any point on the coast line of the mainland or any of the islands.

22. Unless this Court declares and establishes Alaska's rights, Alaska will continue to be injured by the United States' claims to the lands underlying the pockets and enclaves and the waters extending three miles seaward of the 1903 closing lines where the submerged lands are more than three miles from any point on the coast line of the mainland or any of the islands.

Count II: The Tongass National Forest

23. Paragraphs 1-6, 11-13, and 16-19 are realleged and incorporated by reference.

24. Alaska took title to all lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest when it entered the Union on January 3, 1959. *See* Ex. 2 (map showing boundaries).

25. Although the lands described in paragraph 24 are within the lines delimiting the public lands withdrawn and reserved for the Tongass National Forest, the withdrawal and reservation of lands within the boundaries did not reserve or defeat Alaska's title to those submerged lands.

26. Because Alaska took title to the lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest at statehood, the United States has no right, title, or interest in those lands.

27. The United States claims an interest in these lands that is disputed by Alaska and creates a cloud on Alaska's title to them.

28. The United States' claim to these lands will continue to cloud Alaska's title unless this Court declares and establishes Alaska's rights.

Count III: Glacier Bay National Monument

29. Paragraphs 1-6 and 11-13 are realleged and incorporated by reference.

30. On or about February 26, 1925, President Calvin Coolidge created Glacier Bay National Monument by issuing Proclamation 1733 under the authority of the Antiquities Act of 1906, 34 Stat. 223, 16 U.S.C. §§ 431-433.

31. The President set apart as Glacier Bay National Monument "the tract of land" lying within the boundaries described in the 1925 order. *See* Ex. 3 (1939 map depicting 1925 boundaries in purple).

32. The Antiquities Act permits the President "to declare * * * historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest * * * to be national monuments," but permits the reservation of only "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

33. The primary purpose of the 1925 creation of Glacier Bay National Monument was to preserve the land left bare by the retreat of tidewater glaciers for study of the development of flora and fauna.

34. The President did not intend to include as part of the monument the lands underlying marine waters within the boundary described in Proclamation 1733.

35. Given the purposes of the monument, the President's authority to withdraw and reserve lands under the Antiquities Act did not extend to the submerged lands within the boundaries described by the 1925 reservation order.

36. On or about April 18, 1939, President Franklin D. Roosevelt expanded the area of Glacier Bay National Monument by issuing Proclamation 2330 under the authority of the Antiquities Act.

37. The Proclamation added to Glacier Bay National Monument certain public lands, including lands simultaneously excluded from the Tongass National Forest. *See* Ex. 3 (lands transferred from the Tongass National Forest

to Glacier Bay National Monument depicted between the red and green lines).

38. The primary purposes of the 1939 expansion of Glacier Bay National Monument were to set aside a refuge for brown bears and to preserve a coastal forest.

39. The lands underlying marine waters within the 1939 boundary of the newly expanded monument were unrelated to the purposes of a bear refuge and a forest preserve and therefore exceeded "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

40. The President did not intend to include as part of the monument the lands underlying marine waters within the boundaries described in Proclamation 2330.

41. The President's authority to reserve lands under the Antiquities Act did not extend to the submerged lands within the boundaries described by the 1939 proclamation.

42. The State of Alaska took title to all the lands underlying marine waters within the boundaries of Glacier Bay National Monument at statehood, pursuant to the equal footing doctrine and the Submerged Lands Act.

43. The United States' claim of title to the lands underlying marine waters within the boundaries of Glacier Bay National Monument as they were drawn at statehood is adverse to and disputed by Alaska, and creates a cloud on Alaska's title to those lands.

44. The United States' claim of title to these lands will continue to cause injury to Alaska unless this Court declares and establishes Alaska's rights.

PRAYER FOR RELIEF

Alaska prays that the Court require the United States to answer Alaska's Complaint and that, after due proceedings, the Court enter a decree declaring the rights of Alaska as against the United States in the submerged lands within the Alexander Archipelago of Southeast Alaska that are enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration, together with the submerged lands extending three miles seaward from that line and the remainder of Southeast Alaska's coastline, and enjoining the United States, its privies, assigns, lessees, and other persons claiming under it from interfering with the rights of Alaska, as well as award Alaska any other relief the Court may deem just and appropriate.

Respectfully submitted,

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Counsel for Plaintiff

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STATE OF ALASKA,
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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE A COMPLAINT

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE A COMPLAINT

The State of Alaska, through its Attorney General, submits this brief in support of its Motion for Leave to File a Complaint.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Article III, § 2, cl. 2 of the United States Constitution and 28 U.S.C. § 1251(b)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315, which is incorporated by reference into the Alaska Statehood Act, § 6(m), Pub. L. 85-508, 48 U.S.C. note prec. § 21, and the Antiquities Act of 1906, 16 U.S.C. §§ 431-433. Pertinent provisions of these statutes are reproduced in the Appendix. This case also involves the requirement in Article IV, § 3 of the United States Constitution that all new States must be admitted to the Union on an equal footing with all other States. *See Coyle v. Smith*, 221 U.S. 559 (1911).

STATEMENT OF THE CASE

Lands at Issue. The State of Alaska seeks to quiet title to the lands underlying marine waters in Southeast Alaska. Southeast Alaska comprises a narrow strip of mountainous mainland and the Alexander Archipelago —a group of over 1000 islands nearly 600 miles long and 100 miles wide—and contains more than 13,000 miles of shoreline. It is approximately the size of the State of Washington. The lands subject to this action include all lands underlying marine waters within the

Tongass National Forest, created in 1907, and all lands underlying marine waters within Glacier Bay National Monument, created in 1925. The Tongass and Glacier Bay reservations encompass nearly all Southeast Alaska. *See* Exs. 1-3 (maps).

The marine waters of Southeast Alaska are vitally important to the thirty-three coastal communities and numerous tiny settlements there. Fishing is the area's largest private industry, providing the economic base for many Southeast towns. The towns of Southeast Alaska, including the State's capital, Juneau, generally are accessible only by plane or boat.[1] The water forms passages that run among the islands and serve as routes of transportation from one town to another, and even from one part of town to another. In Ketchikan, for example, a small ferry takes passengers, cars, and freight across Tongass Narrows to Ketchikan International Airport, on a nearby island. The town of Craig spans two islands connected by a causeway. The sounds, straits, canals, channels, and narrows of Southeast Alaska—known collectively as the Inside Passage—form its "roads." The state ferry system that travels through these waters is thus aptly called the Alaska Marine Highway.

The Tongass National Forest was established in 1907 and consolidated with a previously created forest reserve in 1908. Proclamation of Sept. 10, 1907, 35 Stat. 2152; Executive Order 908, July 2, 1908. It was substantially enlarged in 1909, in an executive order that delineated its exterior boundaries so as to enclose a huge area that included the mainland of Southeast Alaska, the islands of the Alexander Archipelago, the high seas extending as

[1] The only communities in Southeast Alaska with roads connecting to the continental road system are Haines, Skagway, and tiny Hyder, which has no bank, school, or medical care provider.

far as sixty miles to the west of the Archipelago, and other marine waters. Proclamation of Feb. 16, 1909, 35 Stat. 2226. While the exterior boundaries of the forest thus encompassed marine waters, the United States did not intend to reserve the submerged lands as part of the forest. It was enlarged again in 1925, when the boundaries were extended to enclose both lands skirting the newly created Glacier Bay National Monument and adjacent marine waters. Proclamation of June 10, 1925, 44 Stat. 2578; *see* Ex. 2 (map). Much of this extension was transferred to Glacier Bay National Monument in 1939. *See infra* note 12.

While most of the marine waters within the boundaries of the Tongass National Forest are within three miles of shore—and thus would pass to the State under the terms of the Submerged Lands Act, 43 U.S.C. § 1311—some pockets and enclaves are more than three miles from the shore of the mainland and any islands. *See* Ex. 1 (map). The State believes that all of these marine waters are historic inland waters overlying land to which it took title at statehood under the equal footing doctrine. Despite the location of the enclave strips and pockets more than three miles from shore in waters surrounded by and closely connected to great bodies of land, the United States disputes their historic status as inland waters. The legal effect of this position, if accepted, would be a contraction of the State's constitutional and statutory entitlement to submerged lands.

The State also claims title to the submerged lands that at statehood were within the boundaries of Glacier Bay National Monument, now Glacier Bay National Park and Preserve. This monument was created in 1925 to preserve for study land areas left barren by retreating glaciers. The original reservation boundaries encompassed

the marine waters of Glacier Bay itself. In 1939 the size of the monument was nearly doubled. A large part of the addition was transferred out of the Tongass National Forest, including ocean areas extending three miles into the Pacific Ocean. The main purposes of the 1939 expansion were to create a bear sanctuary and to preserve Alaska's coastal forest. While the exterior boundaries of the monument encompass marine waters, *see* Ex. 3 (map), the United States did not intend to reserve the submerged lands.

Basis of Alaska's Title Claims. The State bases its claim of title to these lands both on longstanding principles of state sovereignty—embodied in the equal footing doctrine—and on the Submerged Lands Act of 1953, applied to Alaska at statehood.

When Alaska became a State on January 3, 1959, it entered the Union with all the powers of sovereignty and jurisdiction enjoyed by the original thirteen States. *See Coyle v. Smith*, 221 U.S. 559, 573 (1911). As such, Alaska entered the Union as a sovereign entity, just like each of the original States did following the American Revolution. *Martin v. Waddell*, 41 U.S. 367, 410 (1842); *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). As sovereign successors to the Crown, the thirteen original States—and thus, when it entered the Union, Alaska—acquired title to the beds of navigable waters.

The principle that title to submerged lands is an attribute of sovereignty developed from early common law that recognized the Crown's title to beds of navigable waters both in England and in the colonies. *See Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894); *Martin v. Waddell*, 41 U.S. at 410. The sovereign needed title to such lands to control navigation, fishing, and other commercial activity. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). The United States, as territorial sovereign prior to the creation of new States, acquires title to the beds of navigable waters of federal territories and holds them in trust for the future States that might be erected out of those territories. *See Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 15 (1935).

Upon the admission of a new State to the Union, the title of the United States to lands underlying inland navigable waters within the State passes to the State, as an incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce. *United States v. Oregon*, 295 U.S. 1, 14 (1935). The sovereign lands that pass to each State include lands beneath inland waters navigable in fact, *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892); tidelands, which consist of the lands between mean high and mean low tide, *Mann v. Tacoma Land Co.*, 153 U.S. 273, 283 (1894); and lands covered by tidally influenced water, regardless of its navigability, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988).

Title to lands underlying offshore marine waters below low tide became the subject of controversy in the 1930s, and this Court determined that the federal government had paramount rights and power over these lands in 1947. *See United States v. California*, 332 U.S. 19 (1947). Congress responded by granting these offshore submerged lands within state boundaries to the States in the Submerged Lands Act, 43 U.S.C. §§ 1301, 1311. The Alaska Statehood Act provided that Alaska would have the same rights given existing States in the Submerged Lands Act of 1953, which codified the States' title to all lands be-

neath both inland navigable waters and offshore marine waters within their boundaries. Alaska Statehood Act, Pub. L. 85-805, 48 U.S.C. note prec. § 21.

This Court has recognized that this automatic transfer of title to submerged lands to the State does not occur where the United States has conveyed them to a third party prior to statehood, *Shively v. Bowlby*, 152 U.S. at 48, or where the United States retains them for a public purpose, *United States v. Alaska*, 521 U.S. 1, 32 (1997). To establish that the United States has retained title to submerged lands, a court must determine both that the United States intended to include submerged lands within a reserve and that it intended to defeat the State's title to the lands. *Utah Div. of State Lands*, 482 U.S. at 202. Courts begin this inquiry with a strong presumption of state title and will not infer an intent to defeat a future State's title unless that intention was definitely declared or otherwise made plain. *United States v. Alaska*, 521 U.S. at 32.

REASONS FOR GRANTING ALASKA'S MOTION FOR LEAVE TO FILE A COMPLAINT

The Court's original jurisdiction is appropriate in this case. Article III, § 2 of the Constitution provides that the "Court shall have original jurisdiction" in all cases "in which a State shall be a party." Congress has further defined this jurisdiction by providing in part that the Court shall have original but not exclusive jurisdiction over all controversies between the United States and a State. 28 U.S.C. § 1251(b)(2). While Supreme Court jurisdiction over this action accordingly is not exclusive, the case raises a type of dispute over which the Court traditionally has exercised its original jurisdiction.

I. THE COURT HISTORICALLY HAS EXERCISED ORIGINAL JURISDICTION TO RESOLVE COASTAL BOUNDARY DISPUTES.

This Court traditionally has exercised its original jurisdiction to resolve disputes between the United States and the States, as well as among States themselves, involving the ownership of offshore submerged lands. *See, e.g., California* ex rel. *State Lands Comm'n v. United States*, 457 U.S. 273, 277 n.6 (1982) (coastal boundary disputes are appropriately brought as original actions in the Supreme Court). Indeed, in the only exception to this practice, a case the United States initiated in district court, the Court suggested that an original action would have been more appropriate:

> It would appear that the case qualifies, under Art. III, § 2, cl. 2, of the Constitution, for our original jurisdiction. We are not enlightened as to why the United States chose not to bring an original action in this Court. [*United States v. Alaska*, 422 U.S. 184, 186 n.2 (1975).]

That case raised the same type of issue presented in Count I of Alaska's complaint in this case—whether a body of water constitutes historic inland waters. *See id.* at 185.[2] Original jurisdiction is just as appropriate here.

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[2] A commentator on the Court's discretionary exercise of its original jurisdiction has noted that the Court "readily takes cases involving tidelands or other property and state-federal boundary cases" because they are "comparable" to boundary disputes between states. V.L. McCusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Docket*, 45 Maine L. Rev. 185, 200 (1993). The Court has long recognized that interstate boundary disputes are appropriate for its original jurisdiction, as the original jurisdiction grant in Article III evolved directly from draft constitutional provisions providing for the resolution of interstate boundary disputes. *Missouri v. Illinois*, 180 U.S. 208, 220-224 (1901).

In addition to its general subject matter, other aspects of this case confirm its suitability as an original action. It raises issues that are initially important both to Alaska and to other coastal States. Further, the Supreme Court has developed a unique expertise in coastal boundary issues that the lower courts do not share. This case also raises a particular boundary issue that only this Court can definitively resolve.

The question whether the pockets and enclaves in the midst of Southeast Alaska are historic inland waters is strikingly similar to the question presented in *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93 (1985). While Southeast Alaska is made up of many islands, it is a coherent region spotted with communities with shared geographic features, weather, lifestyles, and history. The marine waters that join these islands and their communities connect them so closely that they serve just as a highway system would in the contiguous 48 States. Further, the enclaves within these channels and straits are quite close to the land areas that surround them on all sides. Deeming these enclaves to be distinct from the surrounding state waters would be difficult to reconcile with the view from water; land is close by on at least two sides and boaters traveling from island to island cannot detect the enclaves, as they are indistinguishable visually from the rest of the Inside Passage. The waters of Southeast Alaska are so much a part of the State—and vital to the flow of commerce and transportation of residents within it—that the effect of recognizing the enclaves would be similar to creating large areas of exclusive federal jurisdiction within Massachusetts or Nebraska. Such a thing is unthinkable; yet the United States asserts that the southeast part of the State of Alaska is interspersed with nicks and slices of federally-owned territorial seas. *See, e.g.*, National Oceanic and

Atmospheric Administration Nautical Chart No. 17320, Coronation Island to Lisianski Strait (14th ed. 1991); Ex. 1 (map depicting such lands in red).[3]

The title dispute raises a second issue of concern to other States. Alaska's title claim to the submerged lands of the Tongass National Forest is in dispute because the overlying marine waters were within the boundaries of the reservation at statehood. The disputed interests in the submerged lands of the Tongass National Forest reservation—combined with those of the Glacier Bay Monument prestatehood reservation—cover nearly all the submerged lands of Southeast Alaska. Retention of such a vast area of submerged lands would deprive Alaska of admission to the Union on an equal footing. The Court has held that title to certain submerged lands is "an inseparable attribute of the equal sovereignty guaranteed to [the State] on admission." *United States v. Louisiana*, 363 U.S. 1, 16 (1960). *See supra* at 4-5. Such a threat to the sovereignty guaranteed the State surely warrants plenary consideration by this Court.

Other States should be concerned about the prospect that the United States has retained such a large percentage of a State's sovereign lands. Southeast Alaska contains one quarter of the State's shoreline, and a much larger percentage of the State's temperate shores. The United States' retention of so much of a new State's equal footing doctrine lands would erode the principle that a State enters the Union with all the same attributes of sovereignty as preceding States. In such cases, a State's admission would be impermissibly conditioned by the reten-

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[3] Until 1988, when the United States extended its territorial seas to twelve miles, *see* Proclamation 5928, 54 Fed. Reg. 777 (1988), the United States asserted that areas more than three miles seaward of the coastline were high seas.

tion of Federal control over essential state functions.[4] *Cf. Coyle v. Smith, supra* (Congress' limitation upon Oklahoma's choice of capital invalid as a violation of the equal footing doctrine).

This case also is appropriate as an original action because it presents issues this Court is uniquely situated to resolve. Although the Submerged Lands Act simply allocated submerged lands domestically between the coastal States and the United States, the Court for Submerged Lands Act purposes has adopted the definitions of the International Convention on the Territorial Sea and Contiguous Zone (hereafter "Convention"), 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639. *United States v. California*, 381 U.S. 139, 161-165 (1965). The Court's longstanding practice of hearing coastal boundary disputes as original actions has resulted in a unique expertise in interpreting and applying the Convention to the complex historic and cartographic facts presented in Submerged Lands Act cases.[5] The district

[4] While the Court found in *United States v. Alaska* that the equal footing doctrine does not prohibit federal retention of some tidelands at statehood for a public purpose, 521 U.S. at 32, it did not consider the effect on equal footing of retention of a significant percentage of a new State's tidelands.

[5] *See, e.g., United States v. Alaska*, 521 U.S. at 8-11 (baseline and historic waters provisions), 22-27, 31-32 (island and low-tide elevation provisions); *Alabama and Mississippi Boundary Case*, 470 U.S. at 100-101 (historic waters provisions); *United States v. California*, 447 U.S. 1, 5-8 (1980) (baseline and permanent harbor work provisions); *United States v. Louisiana*, 420 U.S. 529, 530 (1975) (accepting report of special master addressing baseline, historic waters, and juridical bay provisions); *United States v. Louisiana*, 394 U.S. 11, 36-40 (1969) (permanent harbor work provisions), 40-47 (low-tide elevation provisions), 48-60 (juridical bay provisions); *United States v. California*, 381 U.S. at 169-170 (juridical bay provisions), 172-175 (historic waters provisions), 175 (roadstead provisions), 176 ("line of ordinary low water" as used in Convention).

courts and courts of appeals rarely if ever address such questions.

Additionally, this case raises a critical issue that only this Court can resolve. In *United States v. Alaska*, the Court stated that inclusion of submerged lands within lines delimiting the public lands reserved before statehood reflects an intent to include the submerged lands in the reservation. 521 U.S. at 38-39, 49-51. As explained below, the United States had reasons for drawing the boundaries of the Tongass National Forest and Glacier Bay National Monument to include marine waters *other than* an intent to reserve them for the purposes of the federal units being created. The *Alaska* Court may have been correct that the Executive intended to reserve submerged lands as part of the National Petroleum Reserve and the Arctic Wildlife Range—the areas at issue in that case—but to conclude without further analysis that the same is necessarily true of *all* coastal reservations encompassing marine waters would seriously prejudice coastal States. That prejudice is especially great in the case of Alaska, the State with the largest area of coastal reservations in the Union.

This Court should clarify whether its approach in *Alaska* applies to prestatehood reservations where the evidence indicates that the United States did *not* intend to reserve the submerged lands within the boundary lines. Otherwise, the *Alaska* decision will continue to cast a cloud over States' title to hundreds of thousands of acres of land not at issue in that case.

II. ALASKA'S TITLE CLAIMS ARE COMPELLING.

The substantiality of the State's title claims also supports the exercise of original jurisdiction in this case.

A. The Waters of the Alexander Archipelago Are Historic Inland Waters of the United States.

Article 7(6) of the Convention "indicates that a body of water can qualify as inland waters if it is a 'historic bay.'" *Alabama and Mississippi Boundary Case*, 470 U.S. at 100. In the *Alabama and Mississippi Boundary Case*, the Court outlined the showing necessary to qualify a body of water as a historic bay:

> The term "historic bay" is not defined in the Convention, and there is no complete accord as to its meaning. The Court has stated that a historic bay is a bay "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." The Court also has noted that there appears to be general agreement that at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations. * * * In addition, there is substantial agreement that a fourth factor to be taken into consideration is the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense. [470 U.S. at 101-102 (footnote and citations omitted).]

At trial before a special master, Alaska can present evidence on each of these factors to support its claim of historic title to the waters of the Alexander Archipelago. This evidence will include the United States' *own* assertions that these waters are inland waters. As demonstrated in the *Alabama and Mississippi Boundary Case*, such specific assertions of the waters' status are critical in evaluating a historic title claim. 470 U.S. at 107-110; *see also United States v. Alaska*, 521 U.S. at 14. In fact, the Court relied upon precisely this kind of evidence in the *Alabama and Mississippi Boundary Case* in holding that the United States had exercised continuous authority over Mississippi Sound for a long period of time.

In the course of the 1903 Alaska Boundary Tribunal,[6] the United States made several unequivocal declarations that the waters of the Alexander Archipelago were inland waters of the United States.[7] The United States characterized its position as being entirely in accord with international law and dictated by the geographical configuration:

> [The political coastline] is an imaginary line which the law imposes as a basis [for jurisdiction]. But for the purposes of international law, instead of follow-

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[6] The Alaska Boundary Tribunal convened in 1903 pursuant to a treaty between the United States and Great Britain for the settlement of questions regarding the boundary line between the territory of Alaska and Canada. The general area of concern was Southeast Alaska. *See* Report of the Special Master, *United States v. Alaska*, No. 84, Orig. (March 1996) at 61.

[7] The United States was not the first to successfully assert dominion over the waters of the Alexander Archipelago. It merely continued Russia's exercise of authority over these waters to protect that country's trade interests in its colony and to prevent illicit traffic in liquor and weapons with the coastal Natives. In its case before the 1903 Alaska Boundary Tribunal, the United States admitted that after an initial protest, it had ultimately recognized Russian sovereignty over the northwest coast and in 1845 warned American vessels not to "frequent the interior seas, gulfs, harbors, and creeks upon that coast at any point north of latitude 54° 40'." 1 *Proceedings of the Alaska Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (1903-04), Part II, Case of the United States, p. 72.

> ing all the convolutions and sinuousities of the [physical] coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these outside inlets are 10 miles. * * * The minute you establish it, the minute you fix it, all waters back of it, whether they are waters in the Archipelago there of Alexander or the Archipielago de Los Canarios, of Cuba, they all became, as Hall says, salt-water lakes: they are just as much interior [or inland] waters as the interior waters of Loch Lomond * * *. [7 *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (1903-04), Argument of Hannis Taylor, p. 611.]

The federal government thus viewed the political boundary of Alaska as skirting the outer edge of the archipelago rather than following the mainland's actual coastline:

> The boundary of Alaska—that is, the exterior boundary from which the marine league is measured—runs along the outside edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands. When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. [*Id.*, Vol. 5, Part I, Argument of the United States, pp. 15-16.[8]]

The United States publicly defended its position on the inland water status of the Alexander Archipelago between

[8] The United States offered more detailed delimitation and comments in its countercase. *See id.*, Vol. 4, Part I, Countercase of the United States, pp. 31-32.

1903 and 1971. In 1964, the United States even reiterated its stance in briefing to this Court. Although the United States had refined its rationale since its 1903 expression and had begun to articulate a rule for straits leading to inland waters, its conclusion as to the status of the waters remained the same:

> Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, *including the straits leading into the Alaskan Archipelago* * * * straits leading to waters between Cuba and its encircling reefs and keys, and Chandeleur Sound. [Ex. 4 (Brief for the United States in Answer to California's Exceptions to the Report of the Special Master at 130-131, *United States v. California*, No. 5, Orig. (October Term, 1964) ("United States Brief in No. 5, Orig.") (footnote and additional internal citations omitted; emphasis added).[9]]

In distinguishing the treatment of the Alexander Archipelago from the straight baselines rule suggested by California in that case, the United States indicated no retreat from its characterization of the waters behind the ten-mile closing lines as inland. Ex. 5 (United States Brief in No. 5, Orig. at 105-107). To the contrary, its presentation to the Court was yet another "public acknowledgment of the official view" that the waters of the Alexander Archipelago "constitute inland

[9] The United States made clear that "the Alaskan Archipelago" was the Alexander Archipelago by referring to an earlier portion of its brief where it had quoted the same passages from the Alaska Boundary Tribunal Proceedings presented herein. Ex. 5 (United States Brief in No. 5, Orig. at 105-107).

waters of the Nation." *Cf. Alabama and Mississippi Boundary Case*, 470 U.S. at 109-110 (United States' concession in earlier brief before the Court that Mississippi Sound was inland waters represented "public acknowledgment of the official view that Mississippi Sound constitutes inland waters of the Nation").

The foregoing demonstrates that the United States asserted authority over the waters of the Alexander Archipelago continuously from at least 1903 until well after Alaska joined the Union on January 3, 1959. The only remaining question under the Court's historic waters analysis is whether foreign nations acquiesced to the claim. They clearly did. Indeed, rather than protesting, foreign nations relied upon the United States' claims of inland waters status for the waters of the Alexander Archipelago in pursuing their own boundary claims.

Great Britain, for example, acquiesced to the United States' position at the 1903 Alaska Boundary Arbitration that the political coastline of the Alexander Archipelago ran along the outside of the islands and that the waters of the Archipelago were inland waters. *See* 3 *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (1903-04), Part III at 79; *id.*, Vol. 4, Part III at 26-32 (British case); *id.*, Vol. 5, Part I at 15-16, and *id.*, Part VII at 611 (United States' case noting British agreement with United States' position). Norway not only acquiesced; it cited the United States' position in support of its claim in the *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116. *See* Report of the Special Master, *United States v. Alaska*, No. 84, Orig. (March 1996) at 95. Norway's adversary of the *Fisheries Case*, the United Kingdom, also cited the United States' position at the 1903 Alaska Boundary Arbitration, as well as the ten-mile closing line rule for bays and straits leading to

inland waters, in support of its position in their dispute. *Id.* at 96-97.

Thus, when Alaska was admitted to the Union, the water areas of the Alexander Archipelago were historic inland waters. The United States had continuously claimed the areas as such from at least the turn of the century until Alaska's admission, a claim in which foreign nations had acquiesced.

A ruling in Alaska's favor on its title claim to the lands underlying these historic waters would not adversely affect the United States' foreign policy obligations or objectives. Recognition of the inland status of the waters of the Alexander Archipelago is entirely consistent with the Convention. Nothing in the Convention—which the United States ratified on March 24, 1961, *Alabama and Mississippi Boundary Case*, 470 U.S. at 106, more than two years after Alaska was admitted to the Union—required a change in the United States' position claiming the waters of the Alexander Archipelago as inland waters. Such a claim is permissible both under Article 4, which authorizes the use of straight baselines to enclose inland waters with a "fringe of islands" like the Alexander Archipelago, and under Article 7(6), which authorizes claims to historic bays.

Indeed, United States officials continued to assert that the waters of the Alexander Archipelago constitute inland waters after the Convention was ratified. State Department Geographer Dr. G. Etzel Pearcy published an article in 1959 explaining the principles of the Convention. G.E. Pearcy, *Measurement of the U.S. Territorial Sea*, Dep't St. Bull. 963 (June 29, 1959). Pearcy intimated in his article that "the archipelago along the southeast coast of Alaska" required the use of straight baselines under the

Convention. *Id.* at 971.[10] He subsequently prepared charts showing straight baselines along the coast of the Alexander Archipelago. Examples of these charts are included in *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries: Hearing Before the Senate Comm. on Commerce*, 92d Cong., 2d Sess. (1972). The Coast Guard and the Interior Department Bureau of Commercial Fisheries relied on these charts for law enforcement purposes throughout the 1960s. *See* Ex. 6 (correspondence by the Coast Guard and Interior Department Bureau of Commercial Fisheries regarding Pearcy Charts).

The United States did not disclaim the inland-water status of the Alexander Archipelago until 1971, when it published a series of charts depicting the waters as territorial seas with several enclaves of high seas more than three miles from the surrounding shores. *See* Report of the Special Master, *United States v. Alaska*, No. 84, Orig. at 166-167. This was the first time the United States affirmatively disclaimed the Archipelago's inland water status, long after Alaska's title had ripened. *Cf. Alabama and Mississippi Boundary Case*, 470 U.S. at 111-114 (disclaimer first made in publication of charts in 1971 insufficient to divest States of submerged lands underlying Mississippi Sound where historic title had ripened).

In response to Alaska's protests, the United States considered adopting straight baselines under Article 4 of the Convention. That effectively would have marked a return to the position the United States had consistently taken from 1867 until 1971—*i.e.*, that the waters of the Alexander Archipelago were inland waters. Two successive State Department legal advisers concluded that the United States could employ straight baselines that were "fully

[10] The United States' historic treatment of the waters as inland waters effectively yielded the same result.

consistent with the most conservative reading of Article 4" of the Convention and would have no adverse effect on the United States' international relations. Ex. 7 (Jan. 16, 1973 memorandum from Legal Adviser Brower to various federal officials at 2). One adviser even concluded that a continued refusal to use straight baselines could not be justified: "We do not believe the use of such a system will have a negative impact on our Law-of-the-Sea negotiating position, *nor do we believe a continued refusal to use such a system is justifiable* in light of the fact that it is so clearly appropriate to this situation." Ex. 8 (Aug. 30, 1972 memorandum from Legal Adviser Stevenson to various federal officials at 12) (emphasis added).

Therefore, Alaska's claim that the waters of the Alexander Archipelago constitute historic inland waters is compelling, and entirely suitable for disposition under this Court's original jurisdiction.

B. Alaska Took Title to All Submerged Lands Within the Boundaries of the Tongass National Forest.

The enclaves within the Alexander Archipelago to which Alaska claims title fall within the outer boundaries of the Tongass National Forest. Alaska claims title not only to the land underlying the enclaves, but to all the lands underlying marine waters within the Tongass. While the forest boundaries have encompassed most of the marine waters of Southeast Alaska since before statehood, this does not deprive Alaska of its title to the submerged lands. Not only has the United States not clearly demonstrated an intent to defeat the State's title to the lands underlying marine waters in the Tongass, the proclamations did not even reserve them. *See Utah Div. of State Lands*, 482 U.S. at 202 (to overcome the strong presumption against defeat of State title to submerged lands, the United States must show that Congress both clearly intended to

include the lands within the reservation *and* affirmatively intended to defeat the future State's title to them). Reservation of the submerged lands would contribute nothing to the purposes for which Congress authorized forest reservations, which this Court has noted is a critical factor in determining federal intent. *United States v. Alaska*, 521 U.S. at 38. Congress authorized creation of national forests for only two purposes—timber protection and favorable water supply—neither of which requires or suggests inclusion of a marine area. *See United States v. New Mexico*, 438 U.S. 696, 709 (1978). The purposes of a forest did not warrant reservation of even an inland river within the boundaries of Alaska's other national forest, the Chugach National Forest, according to the Department of the Interior. *See State of Alaska*, 102 IBLA 357 (1988). Lands underlying marine waters contribute even less to timber and watershed protection, particularly submerged lands up to sixty miles from shore, such as those within the Tongass National Forest boundaries.

Moreover, the Forest Service and Congress for years acted as though the marine area within the Tongass were not part of the forest. For example, in 1950, the Solicitor's Office for the Department of Agriculture found that the Department had no authority over reclaimed tidelands contiguous to national forest lands within the boundaries of the Tongass National Forest. Ex. 9 (Dep't of Agriculture Op. of June 28, 1950). These lands did not have forest status, according to the decision, because the President's authority to reserve "public lands wholly or in part covered with timber or undergrowth" for national forests did not extend to tidelands. *Id.*

The United States has adhered to the position that tidelands are not part of the forest in recent years. In recently revoking a 1925 lighthouse reservation superimposed on the Tongass National Forest, for example, the

Bureau of Land Management distinguished between uplands and tidelands. The order stated that the uplands would continue to be subject to the forest reservation, while the post-revocation tidelands would become "public land." *See* Ex. 10 (Executive Order 4257, June 27, 1925); Ex. 11 (PLO 7056, 59 Fed. Reg. 29206-07 (June 6, 1994)). Thus, although the United States obviously believed that it had defeated the State's title to these submerged lands, it based the defeat on the lighthouse reservation, not on the forest reservation.

The United States may argue that the proclamation's inclusion of marine waters within the forest boundaries compels the conclusion that the President intended to reserve the underlying lands as part of the forest. The purpose of national forests and the United States' subsequent treatment of the submerged lands refute this argument. Nevertheless, this Court's opinion in *United States v. Alaska*, 521 U.S. 1, can be read to support the argument that a proclamation's reservation of lands within a boundary that includes marine waters expressly reserves the submerged lands and thus, by definition, satisfies the first prong of the *Utah Division of State Lands* test. *See* 482 U.S. at 202. Discussing the order that created the National Petroleum Reserve-Alaska ("NPR-A"), the *Alaska* majority stated that in describing a boundary following the ocean side of offshore islands and reefs, the order created a reserve that *necessarily* embraced certain submerged lands—specifically, tidelands shoreward of the barrier islands. 521 U.S. at 37. The majority found no inference required for the conclusion that the United States retained the tidelands within the reserve. *Id.* n.1.

The *Alaska* Court was not considering where the boundary line was located; the parties did not dispute that the boundary was drawn to include some marine waters and therefore in that sense necessarily embraced them. *Id.*

at 31. The boundaries of the reservations in *Montana v. United States,* 450 U.S. 544 (1981), and *Utah Division of State Lands* in this sense also "embraced" equal footing doctrine lands. The *Alaska* Court seemed to say that inclusion of marine waters necessarily indicated that the United States intended the submerged lands to be *reserved* and administered for the same purpose as the uplands—in other words, that no other explanation could exist for boundaries to include lands underlying marine waters. Paradoxically, a presumption remains that boundaries that include lands underlying "bodies" of water do not reserve the submerged lands. *See* 521 U.S. at 37, discussing *Montana* and *Utah Division of State Lands.*

The *Alaska* majority supported its analysis by also considering the purpose of the particular reservation at issue, concluding that the purpose of reserving in federal ownership all oil and gas deposits within NPR-A's boundaries would have been undermined had the deposits underlying lagoons and other tidally influenced waters been excluded. *Id.* at 38.[11] Nevertheless, the Court's discussion of the effect of the boundary line seems to stand alone. It is not clear whether this analysis applies to reservations where the drafting agency had reasons for drawing boundaries out in marine waters *other than* an intent to reserve the submerged lands—the situation with respect to the Tongass National Forest. After the 1925 proclamation, the Tongass boundaries extended around nearly the entire Alexander Archipelago, excluding Glacier Bay National Monument. Rather than extend around each of the hundreds of islands included, it encompasses the entire body of islands. At its southwest corner, the north-south boundary line meets the east-west line *sixty miles out in the ocean. See* Ex. 2 (map); Proclamation of Feb. 16, 1909, 35 Stat.

[11] The Court also found that the Artic Wildlife Range reservation expressly referred to certain submerged lands. 521 U.S. at 50.

2226. This line was not even within the *Nation's* boundaries as the United States defined them at the time. *See* note 3, *supra.* These broad strokes obviously did not reflect a need or intent to reserve the lands underlying such distant marine waters as a national forest, and thus the language of *Alaska* should not be applied categorically to this reservation.

Only this Court can clarify how broadly the *Alaska* language applies. If that language means that whenever a boundary line includes marine waters, a court must find without further analysis that the underlying lands are automatically reserved as well, then this Court unnecessarily developed a sweeping new rule that could affect title to hundreds of thousands of acres of state lands never at issue in *Alaska.* Courts should consider whether the United States had reasons for drawing such a boundary other than an intent to reserve the submerged lands. A rule that finds that submerged lands within the boundaries of a reservation are necessarily reserved—without regard to actual intent—would be irreconcilable with the long-standing presumption of State title to submerged lands under the equal footing doctrine, *see, e.g., Utah Div. of State Lands,* 482 U.S. at 197-198, and the recent clarification that the same presumption applies to lands that pass to a State under the Submerged Lands Act, *see Alaska v. United States,* 521 U.S. at 34.

C. Alaska Took Title to All Submerged Lands Within the Boundaries of Glacier Bay National Monument.

The State also took title to the submerged lands within the boundaries of Glacier Bay National Monument at statehood. The purposes of the monument demonstrate that the United States did not intend the submerged lands underlying the marine waters within the boundaries to be lands reserved for and administered by the National Park

Service. Further, even if that had been the intent of the two proclamations that primarily delineated the boundaries, the President's limited Antiquities Act authority did not extend to these lands.

The Department of the Interior employees who designated the boundaries of Glacier Bay National Monument extended them into marine waters apparently as a matter of convenience, not because they intended the President to reserve the submerged lands under the Antiquities Act. The Antiquities Act permits the President to declare historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest. 16 U.S.C. §§ 431-433. The features of the Glacier Bay area that federal officials wanted to preserve were unrelated to the marine waters.

Glacier Bay National Monument was created in 1925 by Presidential Proclamation[12] after a campaign by the Ecological Society of America, spearheaded by a plant ecologist named William Cooper.[13] Cooper had visited Glacier Bay in 1916 and was intrigued by the unique opportunity to study the regrowth of plant and animal life in a landscape left completely barren by retreating

[12] A 1924 executive order withdrew a large area surrounding Glacier Bay for consideration as a national monument. Ex. 15 (Executive Order 3983, Apr. 1, 1924). The 1925 proclamation created a monument about half the size of this area. Ex. 16 (Proclamation 1733, Feb. 26, 1925, 43 Stat. 1988). Much of the area considered for, but not included in, the monument in 1925 was added instead to the Tongass National Forest. *See* Ex. 2 (1925 addition to the forest highlighted on this map). Most of this area was later transferred out of the forest to the monument. *See* Ex. 3 (map).

[13] *See* Ex. 12 (Letter of Jan. 24, 1924 from First Assistant Secretary of Interior E. C. Finney to Charles C. Adams); Ex. 13 (Letter of Jan. 28, 1924 from Charles C. Adams to E. C. Finney); Ex. 14 (Letter of Feb. 21, 1924 from President of the Ecological Society of America to President Calvin Coolidge).

glaciers. He laid out nine one-meter grids on the soil at variable distances from the glaciers' termini, and returned to study them at five-year intervals. Thus, the original proclamation stated as the reasons for creation of the monument the existence of accessible glacial areas; preservation of the great variety of forest, including mature areas, bodies of youthful trees that had grown since the retreat of the ice, and barren stretches that would become forested in the next century; and the unique opportunity for the scientific study of glacial behavior and the resulting development of flora and fauna. The boundaries of the monument as it existed from 1925 to 1939 encompassed the lands surrounding Glacier Bay on the west, north, and east, and cut across the bay on the south. *See* Ex. 3 (map).

Glacier Bay National Monument was substantially expanded in 1939 when President Roosevelt signed a proclamation nearly doubling its size, making it the largest unit administered by the National Park Service.[14] This expansion was the culmination of efforts to address two concerns. The first was a widespread public outcry to create a sanctuary for the Alaskan brown bear, which had become a "flagship species" for environmental groups. To the public, the fate of the Alaskan brown bear symbolized the question of whether modern Americans could live in harmony with nature or instead would repeat in Alaska the mistakes of the frontier west, such as hunting to near-extinction the buffalo in the nineteenth century.[15] The Senate Special Committee on Conservation of Wildlife Resources held a hearing in Washington, D.C. on protec-

[14] Ex. 17 (Proclamation 2330, 3 C.F.R. 83 (1939)).

[15] *See* Ex. 18 (Letter of Feb. 27, 1934 from William Cooper to H. C. Bryant, with attached articles and cartoon).

tion of the Alaskan brown bears,[16] and President Franklin Delano Roosevelt even took a personal interest in the issue.[17] Much of the land added by the expansion was justified by its desirability as a bear habitat.[18]

The second concern, as characterized by a leading conservationist at the time, was the "urgent necessity * * * to preserve a museum specimen of the great coastal forests of Alaska, including the splendid Sitka Spruce."[19] This wish was addressed by the Park Service's plan to include the coastal uplands to the west of the monument, which at the time was part of the Tongass National Forest.[20] The Forest Service strongly approved of this idea, because it alleviated the pressure to create a national park on Chichagof Island or Admiralty Island, also part of the Tongass, which the Forest Service opposed because it considered these islands to be prime areas for a pulp timber industry.[21]

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16 *Protection and Preservation of the Brown and Grizzley Bears of Alaska: Hearing Before the Special Sen. Comm. on Conservation of Wild Life Resources*, 71st Cong. (1932).

17 Ex. 19 (June 6, 1934 memorandum from President Roosevelt to Harold Ickes, with attached letter); Ex. 20 (Jan. 25, 1939 memorandum from President Roosevelt to Secretary of Agriculture).

18 Ex. 21 (Letter of Oct. 22, 1934 from A.E. Demaray to Secretary of Interior); Ex. 22 (Letter of Dec. 10, 1934 from Harold Ickes to Secretary of Agriculture).

19 *See* Ex. 23 (Letter of Jan. 13, 1932 from conservationist Frederick Vreeland to Horace Albright); *see also* Ex. 22 (Letter of Dec. 10, 1934 from Harold Ickes to Secretary of Agriculture).

20 *See Ex.* 24 (Letter of Jan. 14, 1932 from Horace M. Albright to Frederick Vreeland); Ex. 25 (Oct. 22, 1934 memoranduum from A. E. Demaray to the Secretary).

21 *See* Ex. 26 (Letter of Mar. 2, 1932 from Horace Albright to Stewart Edward White).

It appears the 1939 proclamation drew the boundaries to encompass marine waters simply for convenience. Most of the 1939 addition was simply transferred from the Tongass National Forest into Glacier Bay National Monument. *See* Ex. 3 (map). Descriptions of the proposed expansion approved by Department of the Interior officials, Department of Agriculture officials, the Governor of Alaska, and private organizations promoting the addition reported the western boundary as following "along the Pacific coast" consistently for years before the 1939 proclamation, and documents spanning the period from early 1932 to late 1938 expressly included in the description the islands off the coast.[22] The accompanying maps, however, consistently showed the western area of the extension as the entire area within the boundary of the forest to be transferred, which included an extra strip of submerged lands three miles seaward of the Pacific coast. Apparently to reconcile the written description with the maps, the description was changed to match the forest boundary shortly before it went to the President for his signature in early 1939. Thus, the contemporaneous evidence does not show the requisite clear intent of the United States to reserve the submerged lands within the boundaries as part of the monument.

In any event, the Antiquities Act authority of the President to reserve land for Glacier Bay National Monument was limited to "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431. The purposes of Glacier

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22 *See* Ex. 27 (Letter of Jan. 13, 1933 from Commissioner Moore of General Land Office to Horace Albright); Ex. 28 (Letter of July 20, 1934 from A. E. Demaray to Commissioner of General Land Office); Ex. 29 (Aug. 10, 1934 memoranduum from J. Lee Brown to Mr. Moskey); Ex. 30 (Letter of Oct. 17, 1938 from National Park Service to Joseph Dixon); Ex. 31 (Letter of Nov. 30, 1938 from Joel Wolfsohn to National Park Service).

Bay National Monument extended only to those upland features meant to be preserved; they did not extend to submerged lands unrelated to those features. Although the National Park Service wanted the Glacier Bay reservation to be a national park—and even supported a bill before Congress proposing park status in September 1938 [23]—it eventually abandoned this idea because Congress had opened the monument to mining in 1936 and the Park Service wished to avoid criticism from conservation organizations opposed to any non-conforming uses in a national park.[24] The Park Service's political decision to expand the existing monument rather than further pursue congressional designation as a park imposed limitations on the area the President had authority to reserve and on the permissible reasons for creating the reservation.

This fact was implicitly recognized by the Department of Interior drafters of the 1939 proclamation who suddenly and without explanation recast the reasons for the monument's expansion. Despite overwhelming documentation spanning at least seven years that the paramount reasons for expanding Glacier Bay National Monument were to create a bear sanctuary and to preserve the coastal forest, the 1939 proclamation purported to limit its explanation to a reason consistent with a traditional understanding of Antiquities Act objectives—to add lands necessary for the proper care, management, and protection of "glaciers and geologic features of scientific interest." Ex. 17.

Ultimately, however, the 1939 reservation was an Antiquities Act monument, limited by statute to the

[23] *See* Ex. 32 (Sept. 15, 1938 memorandum from National Park Service to Solicitor).

[24] *See* Ex. 33 (Dec. 27, 1938 memorandum from National Park Service to Secretary of Interior); *see also* Ex. 34 (Letter of Dec. 21, 1938 from National Park Service to William Cooper).

"smallest area compatible with the proper care and management of the objects to be preserved." 16 U.S.C. § 431. Whether those "objects" were landscapes left barren by retreating glaciers, the Alaskan brown bear, the coastal forest, or glaciers themselves, inclusion of the extensive areas of submerged lands within the designated boundaries would have exceeded the limitation on the President's authority and therefore been ineffective.

Like the boundaries of the Tongass National Forest, the Glacier Bay National Monument boundaries bring into question the meaning of *Alaska*'s conclusion that boundaries drawn to embrace submerged lands under marine waters necessarily meet the first prong of *Utah Division of State Lands*. *See* 521 U.S. at 37. Review of an issue of this magnitude—whether the State of Alaska received the submerged lands that pass to all States either as a fundamental attribute of sovereignty or under the provisions of the Submerged Lands Act—should not be determined by rote application of the language in *Alaska*, directed to a significantly different situation. This is particularly true given the evidence that the United States did not have a clear intent to reserve the submerged lands and did not have the authority for such a reservation in any event. This Court should consider whether the United States had reasons for drawing boundaries to include marine waters other than an intent to reserve the underlying land for the purposes of the reservation.

CONCLUSION

The Court should exercise its original jurisdiction and decide this important case. It involves a boundary issue with national and international implications of the sort the Court historically has heard in original actions, and as to which it has special expertise. It also involves a prestatehood reservation issue that is critically important

to Alaska and cannot be resolved by any other court. Alaska has a compelling case on the merits of both issues. Therefore, the Court should grant Alaska's Motion for Leave to File a Complaint.

Respectfully submitted,

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EXHIBIT 1

Historic Waters of Alexander Archipelago

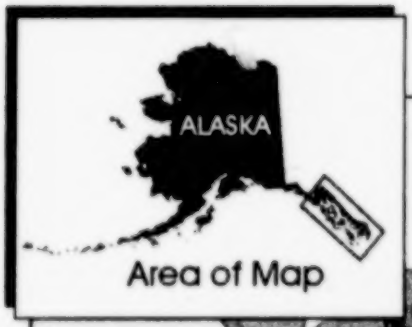
Graphic depiction of closing lines drawn by the United States at the 1903 Boundary Tribunal to mark the seaward limits of the inland waters of the Archipelago. *See 5 Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Congress, 2d Session (1903-04), Pt. I, Argument of the United States, pp. 15-16; *id.* Vol. 4, Pt. I, Countercase of the United States, pp. 31-32.

Territorial sea (3 nautical miles) and inland waters

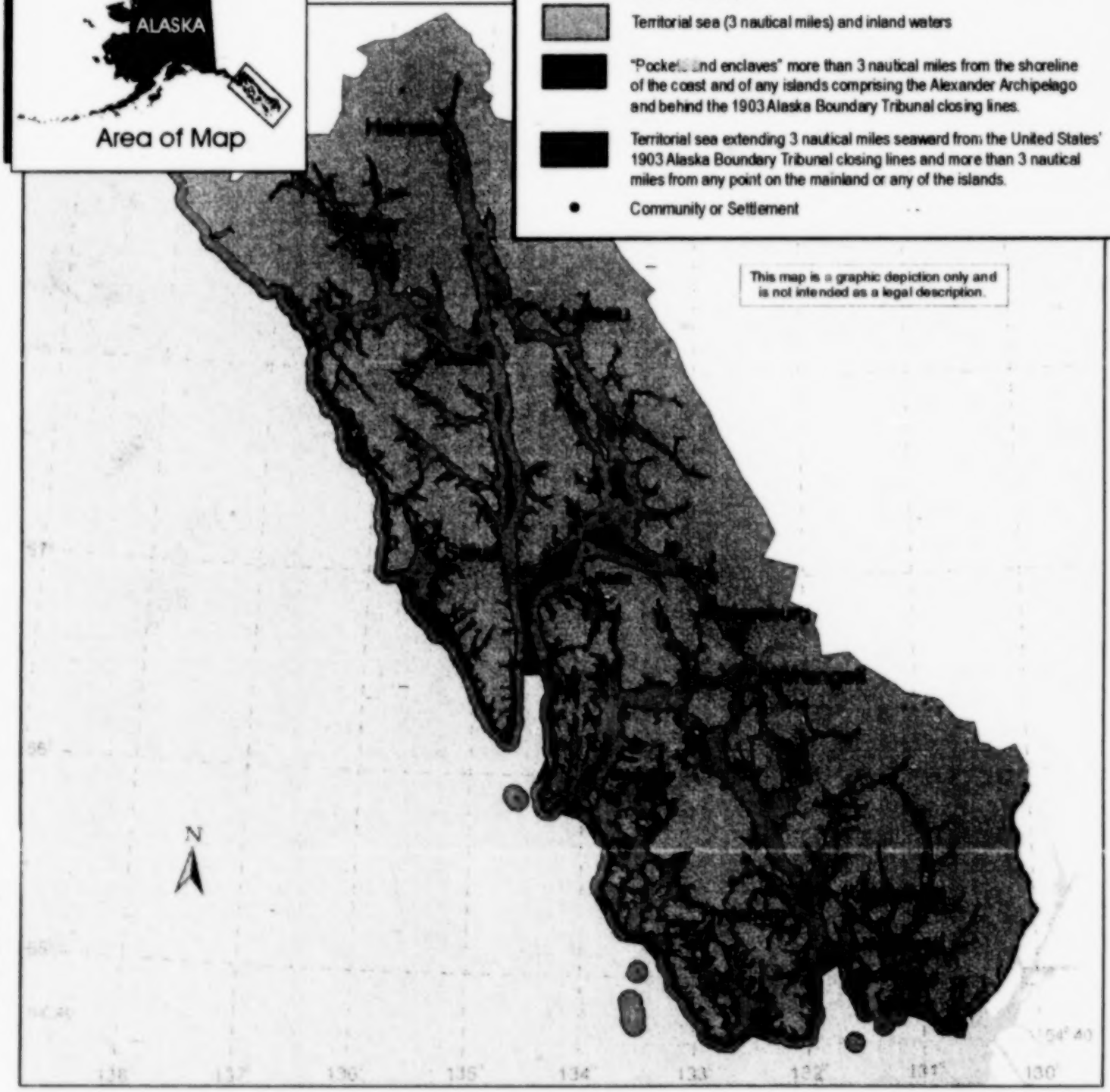
"Pocket and enclaves" more than 3 nautical miles from the shoreline of the coast and of any islands comprising the Alexander Archipelago and behind the 1903 Alaska Boundary Tribunal closing lines.

Territorial sea extending 3 nautical miles seaward from the United States' 1903 Alaska Boundary Tribunal closing lines and more than 3 nautical miles from any point on the mainland or any of the islands.

Community or Settlement



This map is a graphic depiction only and is not intended as a legal description.



Prepared by the Department of Natural Resources, Division of Mining, Land & Water - Technical & Data Management Section *October, 1999*

Exhibit 1

1e

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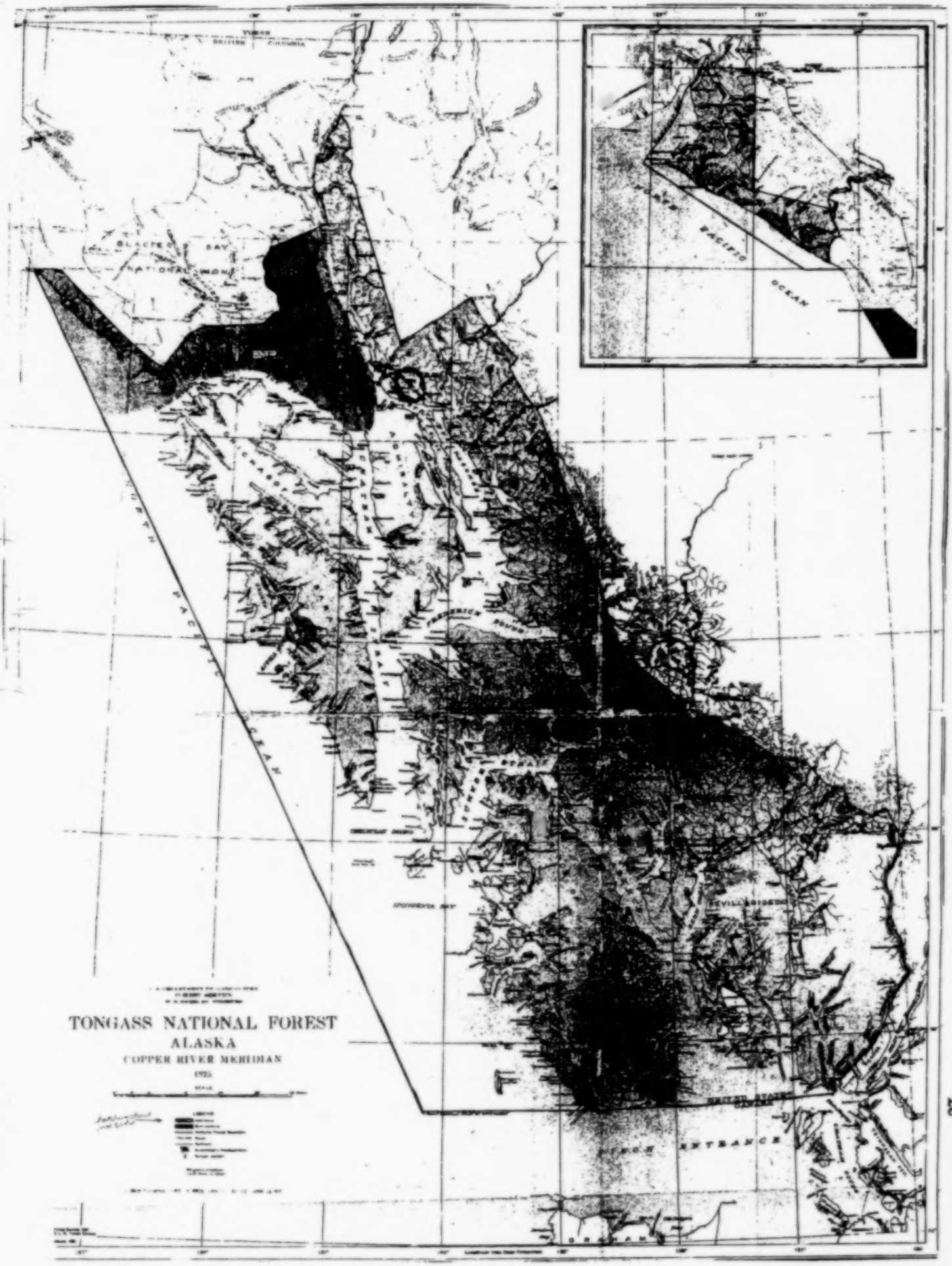
TONGASS NATIONAL FOREST
ALASKA
COPPER RIVER MERIDIAN
1925
PACIFIC OCEAN
GULF OF ALASKA
DIXON ENTRANCE

Exhibit 2

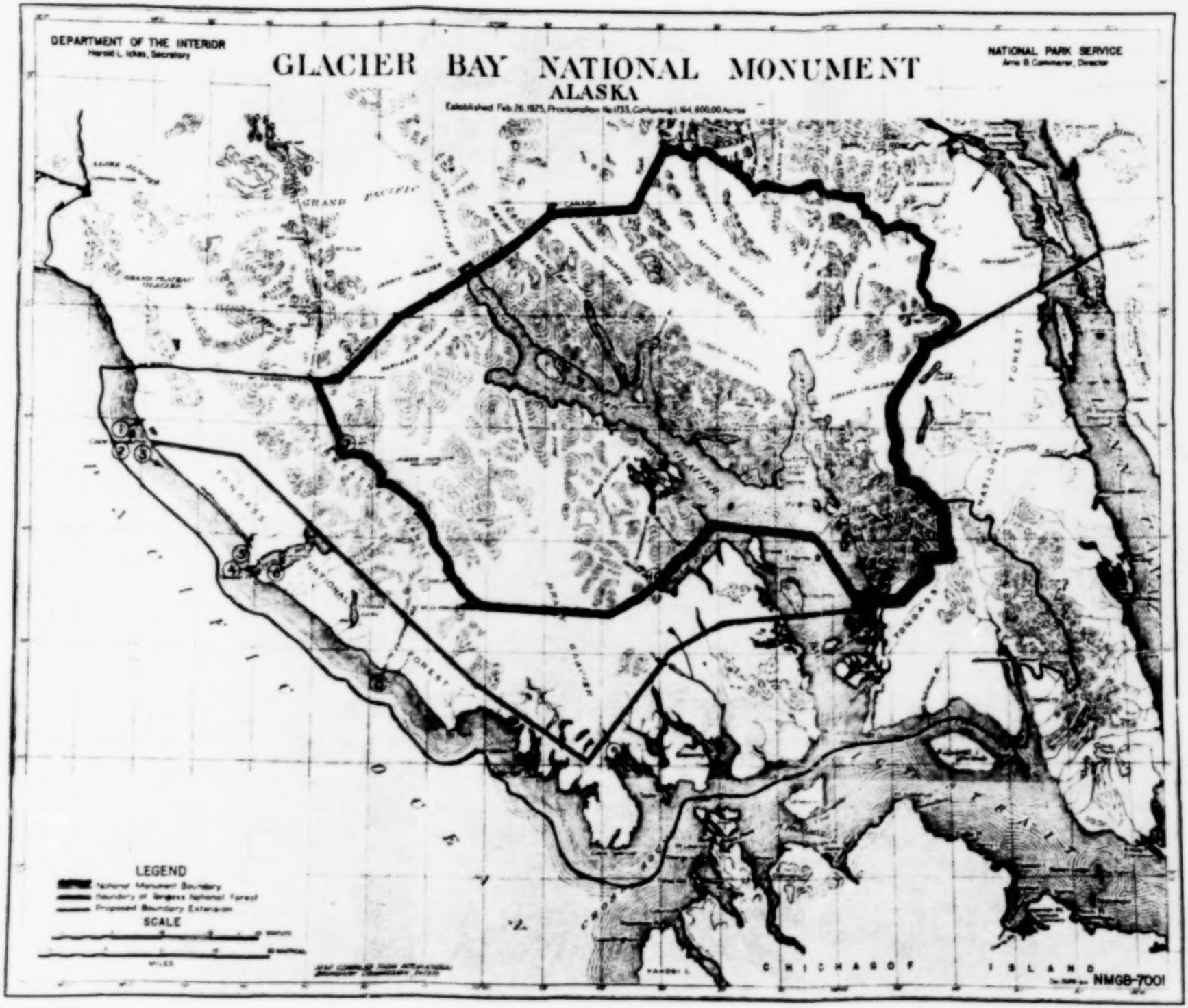
DEPARTMENT OF THE INTERIOR
Harold L. Ickes, Secretary
GLACIER BAY NATIONAL MONUMENT
ALASKA
NATIONAL PARK SERVICE
Arno B. Cammerer, Director
GRAND PACIFIC
LEGEND
SCALE
MILES
NMGB-7001

Exhibit 3

Publisher's Note:

The following page/s 4e is/are missing in the original document.

EXHIBIT 4
Pages 1-2

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tions, S. Rept. No. 1683, 49th Cong., 2d Sess., p. V (Cong. Doc. Ser. No. 2456).[103]

(d) *Straits of Magellan.*—On January 18, 1879, Secretary of State William M. Evarts wrote to Thomas O. Osborn, American Minister to Chile and the Argentine Republic, pointing out that the boundary dispute between those countries was jeopardizing the shipping of nations to whom "the Straits of Magellan are a thoroughfare," and saying that "no sufficient reason is seen why either should not be held accountable for any injury which may have been occasioned or may result to vessels and citizens of the United States." *Foreign Relations of the United States*, 1879, pp. 15-16.[104]

(e) *Straits leading to inland waters.*—Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters,

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[103] Report accompanying S. 3173, 49th Cong., 2d Sess., which became the Act of March 3, 1887, 24 Stat. 475, *supra*, p. 125.

[104] In *The Banger* [1916], Prob. 181, 185, involving a prize taken in the Straits of Magellan, the court said:

"This strait connects the two vast free oceans of the Atlantic and the Pacific. As such, the strait must be considered free for the commerce of all nations passing between the two oceans.

"In 1879 the Government of the United States of America declared that it would not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and would hold responsible any Government that undertook, no matter on what pretext, to lay any impost on its commerce through the strait."

The decision was that the strait, though open to international navigation, was, at the point of capture, assumed to be territorial water of Chile; but that only Chile could complain of the seizure as a violation of its neutrality.

the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago (*supra*, pp. 105-107), straits leading to waters between Cuba and its encircling reefs and keys (*supra*, pp. 103-105), and Chandeleur Sound (*supra*, p. 110; see also, *infra*, pp. 153-155).[105]

(f) *Islands.*—The State Department has had relatively little occasion to discuss the subject of islands as such, probably because it is universally agreed that each is entitled to its own three-mile belt, and the only serious questions have concerned the status of straits formed by particular islands. However, on May 18, 1869, Secretary of State Hamilton Fish did write to Secretary of the Navy Adolph E. Borie (1 Moore, *Digest of International Law* (1906), 713):

> The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast line of the several islets or keys with which Cuba itself is surrounded. * * *

[105] The proper application of this principle becomes a matter of some difficulty in situations where several straits lead to the same body of inland water; and a circularity is involved in situations where the "inland" status of that body depends on whether its entrances are to be subject to the ten-mile rule or to three-mile marginal belts. It may be that some of the applications have been unduly liberal—for example, in the case of Chandeleur Sound—but this need not concern us here, for, as we shall show, even accepting those liberal applications as correct, they do not reach the situation in California. See *infra*, pp. 151-155.

EXHIBIT 5
Pages 1-4

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was entitled to more than three miles of territorial water around Cuba because the presence of many offshore reefs and islands within three miles of the Cuban coast made a three-mile belt an inadequate defensive area. Secretary Seward made the obvious reply, that the three-mile belt should be measured from the offshore islands rather than from the shore of Cuba proper. This in itself was enough to answer the Spanish contention, and of course was plainly correct. We have always conceded that every island is entitled to a three-mile belt around it. However, Secretary Seward went on to express the view, based on his examination of maps, that the "line of keys is properly to be regarded as the exterior coast line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys." Undoubtedly that is true of most of the Cuban keys, especially those closely grouped along the north coast where the principal difficulties with American shipping were arising. Whether Secretary Seward's statement must necessarily be understood as a categorical assertion that *every* islet off the Cuban coast forms part of a single exterior coast line seems doubtful;[80] but even

[80] Secretary of State Hamilton Fish, writing on May 18, 1869, to Secretary of the Navy Adolph E. Borie, referred only to the three-mile belt around each key, without suggesting that the line of keys marked the limit of inland waters (1 Moore, *Digest of International Law* (1906) 713:

"The maritime jurisdiction of Spain may be acknowledged to extend not only to a marine league beyond the coast of Cuba itself, but also to the same distance from the coast line of the several islets or keys with which Cuba itself is surrounded. Any acts of Spanish authority within that line can not be called into question, provided they shall not be at variance with law or treaties."

if it is so understood, it is by no means necessary to join them by such long closing lines as California indicates." [81] Of seventeen lines, one exceeds the ten-mile limit by 7/16 miles. So small a concession to a foreign power, in the particular geographical situation there presented, may be dismissed as *de minimis*. Certainly it does not prove a policy of claiming on our own coasts the very long lines suggested by California.[82]

California refers (Brief, 76; 108, n. 62) to the line described by the United States in the Alaska Boundary Arbitration of 1903 as the "coast line" of the Alaska Archipelago, and shows on a map that lines longer than ten miles can be drawn between islands of that group. However, those lines are not the lines described by the United States in that arbitration.[83]

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[81] According to Naval Hydrographic Charts Nos. 2617, 2618 and 2620, the Gulf of Batabano, for which California shows closing lines of 23 miles at the east end and 59 miles at the west (Brief opposite p. 74), can be enclosed by the following lines: Punta Oriental to Cayo Piedras, 7 miles; thence to an unnamed sandy islet at about 21°48'30" N., 81°12'15" W., 10 miles; thence to Cayos de Dios, 10 miles; thence to Cayo Ingles, 4 1/2 miles; thence to Cayo Largo 7 miles; thence to Cayo Estofa, 2 miles; thence to Cayo Rosario, 7 miles; thence to Cayo Cantiles, 1 1/2 miles; thence to Cayo Avalos, 3 miles; thence to Cayos Aguardientas, 2 miles; thence to Cayo Campos, 1/2 mile; thence to Cayo Ilicacos, 1/2 mile; thence to Cayo Matias, 2 miles; thence to the Isle of Pines, 4 miles; thence to Cayos los Indios, 5 miles; thence to Cayos de San Felipe, 8 miles; thence to Punta Santo Domingo, 10 7/16 miles.

[82] The question of how maritime limits should be drawn where there are offshore islands is discussed *infra*, pp. 119-140. The present discussion is not intended to deal with that question beyond showing that the United States has not exceeded the ten-mile rule in that connection.

733-800-04—9

[83] The line claimed by the United States was described as follows (4 *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (Cong. Doc. Ser. No. 4602), Pt. I, Counter Case of the United States, p. 32):

"In the present instance the political or legal coast line drawn southward from Cape Spencer would cross to the northwestern shore of Chichagof Island and follow down the western side of that island and of Baranof Island to Cape Ommaney; at this point it would turn northward for a short distance and then cross Chatham Strait to the western shore of Kuiu Island; thence again turning southward along that shore and along the outlaying islets west of Prince of Wales Island, the line would round Cape Muzon and proceed eastward to Cape Chacon; thence following northward along the eastern shore of Prince of Wales Island to Clarence Strait it would cross the latter at its entrance and proceed southeastward to the parallel of 54°40' at the point where it enters Portland Canal."

None of the closing lines actually described needs to exceed ten miles in length, and the United States repeatedly emphasized that none was to be drawn so as to be more than ten miles:

> When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Summer Strait and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. That fact, according to the authorities quoted in the British Counter Case, pp. 24-28, places them within the category of territorial waters. [5 *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (Cong. Doc. Ser. No. 4603), Pt. I, Argument of the United States, pp. 15-16]
>
> But for the purposes of international law, instead of following all the convolutions and sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not

encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these outside inlets are 10 miles. [*Id.*, vol. 7 (Cong. Doc. Ser. No. 4605), Argument of Hannis Taylor (for the United States), p. 611.]

This line [proposed by Great Britain] crosses the Yakutat Bay a distance of over 16 miles from headland to headland. It never has been claimed that under the law of nations such a line could be drawn from headland to headland a greater distance than 10 miles. [*Id.*, vol. 7 (Cong. Doc. Ser. No. 4605), Argument of Jacob M. Dickinson (for the United States, p. 844.]

Since the line described can be drawn without crossings more than ten miles long, and the United States emphasized that it was so drawn, there is no justification for California's assumption that the United States was claiming longer lines.

A similar fallacy is involved in California's reference (Brief, 108, n. 62) to the fact that by the Act of February 26, 1881, 21 Stat. 351, Congress approved an agreement between New York and Connecticut, establishing the boundary between those States in Long Island Sound. California accompanies this with a map showing that a line from Montauk Point, on Long Island, to Watch Hill Point, Rhode Island, is 14 miles long (Brief, opposite p. 108), implying that Congress approved that as a closing line. The implica-

EXHIBIT 6
Pages 1-8

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Address Reply to:
Commandant
U.S. Coast Guard (OLE-
Washington, D.C.
20591

5921
22 June 1967

Dr. G. Etzel Pearcy, Geographer,
Office of Research in Economics and Science
Department of State
Washington, D.C. 20520

Dear Dr. Pearcy:

The recent extension of the fisheries jurisdiction of the United States to twelve nautical miles and the recently concluded fisheries agreements with Japan and the Soviet Union places additional requirements on Coast Guard units charged with law enforcement responsibilities.

In 1964, your office made available to the Coast Guard a series of charts illustrating baselines and the three-mile territorial sea which were drawn in accordance with appropriate provisions of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958. These charts represented an "exercise in baseline drawing" and did not represent an official delineation of the territorial sea. However, the charts were useful as a guide for Coast

Guard operational commanders when carrying out law enforcement activities. These charts, while useful to the extent provided, did not cover all areas of the territorial sea off Alaska, Hawaii, and the outlying areas.

If your office can make available to the Coast Guard charts illustrating the extent of the contiguous fisheries zone and the territorial sea of the United States for all areas, under the jurisdiction of the United States, these charts would be extremely useful to the Coast Guard in carrying out law enforcement responsibilities.

Sincerely yours,

W.A. JENKINS
Captain, U.S. Coast Guard
Chief, Law Enforcement Division
By direction of the Commandant

UNITED STATES GOVERNMENT

Memorandum DATE: May 24, 1963

To: Regional Director, Region 5, Bureau of Commercial Fisheries, Juneau

From: Director, Bureau of Commercial Fisheries

Subject: Instructions re Baselines Charts for Alaska

Forwarded under separate cover is a set of charts of various areas of the Alaskan coastline. On these charts lines have been drawn showing 1) the waters which are internal or territorial waters under the present baselines drawn by the arcs-of-circles method following the sinuosities of the coast, plus a 24-mile closing line for bays; and 2) the waters which would become territorial waters by application of straight baselines (in addition to the 24-mile closing line for bays) following the criteria set out in the Convention on the Territorial Sea and the Continuous Zone adopted by the United Nations Conference on the Law of the Sea, Geneva, 1958.

The limits of the territorial sea using the first method are outlines in red on the charts. The additional areas of waters which would be enclosed using the straight baseline method are shaded in green. In some areas, of course, straight baselines would either not be applicable or their use would not result in additions to territorial waters beyond what would already be encompassed through the present method; therefore, in these areas no attempt has been made to draw them.

You are requested to conduct a study which will assess, on the basis of the available evidence or best estimates, the *additional* fishery resources, in terms of annual poundage and value, of present and reasonably potential use which would be reserved to American fishermen by appli-

cation of straight baselines as depicted on the charts. The data should be presented by areas (e.g., Prince William Sound) and by species insofar as a species breakdown may be practicable. In any event, data are desired on halibut, shrimp, and king crab specifically.

You are especially cautioned that these charts have *no official standing whatever* within the United States Government. No inference should be drawn from the existence of the charts except the obvious one that the United States Government is studying the matter of straight baselines. Moreover, while it is to be presumed that the lines have been drawn on the basis of an objective interpretation of the criteria contained in the Geneva Convention, there can be no assurance that if the United States were to decide to change its policy on this matter, the lines adopted would be the same as those presently shown.

I anticipate that it will be necessary and desirable for your staff to work with the staff of the Alaska Department of Fish and Game in preparing the requested study. The cautions expressed in the immediately preceding paragraph should be conveyed to such persons in the Alaska Department as may have access to the charts. Publicity as to the existence of the charts and the fact that such a study is being made should be avoided if possible within the limits imposed by the necessity to maintain good relations with the State Government.

Please arrange to make 50 copies of your study available in my office by July 15, 1963.

DONALD L. MCKERNAN

December 19, 1963

Regional Solicitor, Anchorage

Fisheries Management Supervisor, BCF, Juneau

Extent of territorial sea along U.S.-Canadian border, Dixon Entrance

Sometime ago, the 17th Coast Guard District requested and received from the Department of State a set of charts delimiting the territorial waters of the United States off Alaska. As a matter of interest, I asked their Legal Officer (Cdr. Cliff DeWolf, whom you met in Anchorage) about the extent of the territorial sea off Cape Muzon as the international boundary begins on land at that point. I was told the State Department charts show a territorial sea of three miles from Cape Muzon.

As you might expect, the charts supposedly have no "official standing" but they obviously will be the bases for determining the limits of legal authorities by the Coast Guard and concomitantly by the joint BCF-CG fisheries patrol units.

In view of your study of this particular question in the past, I knew you would be interested in this interpretaton and might have some comments.

We do not have a set of the charts but hope to obtain them soon from 17 CGD.

RONALD C. NAAB

RCNAAB: 1m

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Anchorage Region
P.O. Box 166
Anchorage, Alaska

January 23, 1964

Memorandum

To: Fisheries Management Supervisor, Bureau of Commercial Fisheries, Juneau

From: Regional Solicitor, Anchorage

Subject: Extent of territorial sea at Cape Muzon

I was interested to learn from your memorandum of December 19 that the State Department apparently recognizes a territorial sea off the southern tip of Cape Muzon.

The Alaskan Boundary Tribunal which established the international boundary between Canada and the United States in Dixon Entrance did agree that the boundary should run from Cape Muzon to the Tongass Channel. I attempted to ascertaain whether under international law a reference to a point of land established, by implication at least, a territorial sea off shore of that particular reference point but was unable to find any authority pro or con.

I think this might be worth a referral to your Washington office where it could be brought to the attention of the State Department and a committee ruling made. Apparnetly there is some conflict in the Canadian and United States views on this point.

WILLIAM W. REDMOND
Regional Solicitor

February 4, 1964

Director, BCF, Washington, D.C.

Regional Director, BCF, Juneau, Alaska

Extent of territorial sea at Cape Muzon, Alaska

Sometime ago we began investigating the extent of the territorial sea off Cape Muzon, since the international boundary between Canada and the United States apparently originates on land at this point. Our interest was initially from the standpoint of possible encroachment by Japanese or Russian vessels but greater impetus has been added with the Canadian's announcement that they will revise their territorial sea boundaries this spring.

Regional Solicitor Bill Redmond reviewe' the question but was unable to locate any precise autho ity. The issue remained in that state until recently, whe. he 17th Coast Guard District received a response to their request for a set of charts delimiting the territorial sea off Alaska as interpreted by the Department of State. We have not been provided a set of these charts but the 17th Coast Guard District Legal Officer told us that the charts showed a three mile territorial sea surrounding Cape Muzon.

We have been advised that the Department of State claimed the charts provided the 17th Coast Guard District had no "official standing." This disclamation seems somewhat irrelevant for it is obvious and, we believe, was made known to the State Department that the charts will be used for enforcement purposes and therefore may serve as the basis for action by United States patrol vessels against foreign nationals.

The interpretation indicated by the charts was called to the attention of Bill Redmond, who has doubts as to its validity (a copy of Redmond's memorandum is attached). In all likelihood we wiill be asked by the Coast Guard,

the State of Alaska, or others for our interpretations if any foreign vessel, including Canadian, is apprehended or reported within this area of the "territorial sea." We, therefore, request a statement outlining the views and/or policy of the Bureau regarding this apparently questionable area.

(Sgd) Harry L. Rietze

HARRY L. RIETZ

cc: Regional Solicitor
Attachment

RCNAAB: 1m

April 17, 1964

UNITED STATES GOVERNMENT

Memorandum

To: Regional Director, BCF, Juneau

From: Fisheries Management Supervisor, BCF, Juneau

Subject: Delineation of territorial sea base lines, Southeast Alaska

Statistical Liaison Officer Bill Evans informed me that you desired my opinions regarding the subject base lines, with particular reference to the entrance of Cross Sound, as depicted on charts provided this region by the Central Office. The charts were provided by Central Office in 1963 and used to determine the fishery resources which would be effected by the adoption of a straight base line method of determining territorial seas and/or the adoption of a 12 mile territorial sea or fishing zone.

To determine the adequacy of the base line interpretations as shown on our charts, I consulted other charts in the possession of the 17th Coast Guard District. The Coast Guard charts were provided by their Commandant's Office to delineate the three mile territorial sea to be used for enforcement purposes concerning foreign incursions. Accompanying the Coast Guard territorial sea charts was correspondence from the Commandant, which stated the lines delimiting the U.S. territorial seas and the base lines had been determined by Dr. G. Etzel Pearcy, geographer of the Department of State, in accordance with rules of the Convention on the Territorial Sea and Contiguous Zone of 1958. Since these rules are subject to various interpretations by the individual when applied to any particular coast line, minor differences in the precise location of said lines are inherent. These differences can only be

resolved by judicial review. Dr. Pearcy's boundaries, being considered as expert opinion, were determined adequate basis for the purposes of law enforce. .ent upon foreign nationals.

A careful scrutiny of the Coast Guard's territorial sea charts revealed they are copies of the charts which had been provided this region by the Central Office. You will recall that when the charts from Central Office arrived we suspected they were the same charts displayed by State Department representatives during the Resource Management conference in January of 1963. Therefore, the territorial sea base lines appearing on our charts represent the interpretations of a Department of State expert in this field and, in my opinion, should be considered the most authoritative delineation available.

RONALD C. NAAB

April 17, 1964

Regional Director, BCF, Juneau

Fisheries Management Supervisor, BCF, Juneau

Delineation of territorial sea base lines, Southeas Alaska

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RONALD C. NAAB

cc: Bill Evans
RCNAAB:lm
600-02

EXHIBIT 7
Pages 1-4

DEPARTMENT OF STATE
Washington, D.C. 20526

January 16, 1973

MEMORANDUM

To: COA—Amb. McKernan
IO—Mr. Herz
Commerce—Mr. Pollock
Defense—Mr. French
Interior—Mr. Ratiner
Justice—Mr. Rashkow
Transportation (CG)—Capt. Yost

From: L—Charles N. Brower

Subject: Baselines for the Alexander Archipelago

The general background on this issue is contained in the first four and one-half pages of the earlier memorandum of August 30 which I have attached for your information. As you recall, a meeting of the Executive Group was held on September 7 to discuss the problem of the baselines in the Alexander Archipelago area of the Alaska Coast as reflected on the provisional charts prepared by the Baselines Committee. It was agreed at that time that the present maps of the area should be withdrawn. However, it subsequently proved impossible to reach complete agreement on a method for implementing that decision, particularly because of difficulties in resolving questions related to the domestic legal effect of various possible alternative solutions. Consequently, on September 22, Mr. Stevenson requested an official posi-

tion from the Department of Justice on certain legal questions with respect to the domestic legal effect of either an historic claim or the use of straight baselines to enclose the waters of the Alexander Archipelago as internal waters. Copies of that request and the response from Justice are attached.

With regard to the possibility of an historic internal waters claim, the Department of Justice concludes that such a claim would expand the area of submerged lands in which the state has rights under the Submerged Lands Act. Also, the arguments presented in the earlier memorandum concerning an historic claim clearly indicate that there is a substantial question as to whether there is sufficient evidence in this case to establish such a claim. As the Justice Department notes on page 4 of its letter, "the United States must take care to comply with standards of proof employed in international law. To deviate from those standards would risk compromising the disclaimers to alleged historic title, which the United States has already made in connection with other parts of our coasts." The Justice letter does indicate its belief that the espousal of an historic *territorial sea* claim would *not* expand the area of submerged lands under State control. However, such a claim may not be consistent with the Convention on the Territorial Sea and the Contiguous Zone and would be relatively novel in international practice (there are only three instances in which such claims *may* have been made and they are not clear-cut). In any case, an historic territorial sea claim would also be based on questionable evidence and could adversely affect earlier U.S. disclaimers. Consequently, an historic claim of either type would seem inadvisable in this instance.

As to the question of the possible use of straight baselines in the area, we believe that there are basically two viable options.

OPTION 1: Apply a system of straight baselines to the Alexander Archipelago.

As is explained in Mr. Stevenson's August 30 memorandum, the area in question clearly meets the requirements of the Convention on the Territorial Sea and Contiguous Zone (and of the 1951 Norwegian Fisheries Case before the ICJ, of which Article 4 of the Convention is simply a codification). The United States could, therefore, apply straight baselines in the area in a manner fully consistent with the most conservative possible reading of Article 4. Since this use of straight baselines would not go beyond that which all would agree is clearly permissible under the Convention, it is extremely doubtful that it could have the effect of encouraging claims by others going beyond the proper limits of the Convention as we interpret it. States which wish to make such claims either have already done so or are unlikely to be deterred from doing so simply because the United States does not use straight baselines at all, even where clearly justified. More than one-half of the coastal States already use straight baselines, and since our lines would clearly be in accordance with recognized international law, we would remain in an equally strong position to argue against any misuse of straight baselines for purposes not envisioned by the Convention. Also, it is clear that this option presents the simplest solution since it does not involve the elaborate justification required for an historic claim. Although the Justice Department letter indicates some risk of litigation over the issue, it does state Justice's belief that the present application of a system of straight baselines in the Alexander Archipelago would not increase

the area of submerged lands in which the state has rights under the Submerged Lands Act. Finally, the Justice letter clearly takes the position that it is within the discretion of the Executive to draw straight baselines for one or more areas of the United States coast and not for other areas.

OPTION 2: Apply a system of straight baselines to the Alexander Archipelago on the condition that the state waive all claims it might assert to the natural resources of the additional areas of submerged lands beneath territorial seas.

The Justice Department letter indicates some likelihood of litigation with the State of Alaska over the ownership of seabed resources and also notes the same possibility of litigation with other states which feel that straight baselines should be applied to areas of their coasts as well. Consequently, they suggest that a waiver of all seabed mineral resource claims in the area affected by a change to straight baselines be obtained from the State of Alaska before such a system is applied. Such a waiver would apply to all areas of submerged lands beneath areas of territorial sea added due to the drawing of straight baselines and would eliminate any possibility of litigation with Alaska concerning ownership of such submerged lands. Since other states desiring straight baselines would presumably want them for the purpose of expanding their area of submerged lands, the use of the waiver would also deter them from seeking similar application of straight baselines. If accepted by Alaska, this procedure would, of course, remove the possibility of financial loss to the Federal Government from possible adverse court action on the issue.

The major disadvantage to this option is that it could require lengthy negotiations with the State of Alaska to

arrive at an agreement on a waiver provision. Also, it is possible that other states such as Louisiana would hear of the possible use of straight baselines and begin to argue their own case anew, thus complicating the negotiation of a waiver with Alaska.

We expect to discuss this subject at the Executive Group meeting on January 17. We hope to reach final agreement on this issue and that agency representatives will attend with the authority to approve such a decision.

Attachments

EXHIBIT 8
Pages 1-13

DEPARTMENT OF STATE
Washington, D.C., 20520

LIMITED OFFICIAL USE

August 30, 1972

MEMORANDUM

To: S/FW-COA—Ambassador McKernan
IO—Mr. Herz
INR—Mr. Hodgson
Interior—Mr. Ratiner
Commerce—Mr. Pollock
Defense—Mr. French
Justice—Mr. Rashkow
DOT/Coast Guard—Captain Hallberg

From: L—John R. Stevenson
/s/ JRS

Subject: *Baselines for the Alexander Archipelago: Background for September 1 Meeting*

Introduction

This memorandum provides background for consideration of a problem which has arisen in connection with the delimitation of the territorial sea and the contiguous zone in Southeastern Alaska, as shown on charts prepared by an interagency committee established under the Law of the Sea Task Force. The charts use the arcs-of-circles method to depict the territorial sea and contiguous zone in the Alexander Archipelago, a group of large islands

separated from each other and the mainland by narrow straits. Alaskans have reacted strongly to this approach, which they believe is inconsistent with what they consider the traditional treatment of the waters of the Archipelago as internal waters, and have urged that the federal government either use straight baselines to enclose the area as internal waters or assert an historic claim to that effect. They have submitted limited, but material, evidence in support of their view of the historic treatment of these waters. This memorandum sets forth the evidence, the policy considerations, and the action we propose to resolve this problem. I have scheduled a meeting for Friday, September 1, at 2:30 p.m. to consider the matter.

I. BACKGROUND

The Committee on the Delimitation of the United States Coastline was formally established by a memorandum dated August 7, 1970 from the Acting Legal Adviser of the Department of State to the Executive Operations Group of the Law of the Sea Task Force. The Committee was established under the Task Force and consists of members from the Departments of State, Commerce, Justice, Interior and Transportation.

Guidelines for the Committee's operations were set out in an attachment to the August 7 memorandum (Tab A). The purpose of the Committee was to delimit, provisionally, baselines, the territorial sea and the contiguous zone for the entire coastline of the United States. The memorandum establishing the Committee indicated that the charts would contain sufficient caveats to indicate that they were not a final and definitive U.S. position. It further stated that

> It is not intended that the charts resulting from the Committee's work will be circulated throughout the

Government even as a provisional U.S. position, but rather will be available for use when current and pressing problems arise.

The original task was completed in late 1970 and, after approval by the members of the LOS Task Force, and notwithstanding the original intent, a full set of the charts was published in April 1971 and has been circulated throughout the Government and made available to private individuals and foreign governments.

On August 31, 1971, Governor William A. Egan of Alaska wrote to President Nixon to protest the publication of the maps, which the Governor claimed did not accurately represent the maritime boundaries of the State of Alaska. Governor Egan argued that the straight baseline method of delimitation should be used in Alaska or, alternatively, that historic claims should cover all of the water areas inside the Alexander Archipelago. He requested that the maps be withdrawn pending the changes requested.

Under Secretary Irwin responded to Governor Egan in December, indicating the purpose of the maps and noting that the drawing of the boundaries involved considerations fundamental to U.S. law-of-the-sea policy. He pointed out that the United States had national security reasons related to its law-of-the-sea objectives for avoiding the use of straight baselines and noted that this had been a consistent U.S. policy. Mr. Irwin indicated that each map bore the caveat that the lines are provisional and subject to change through amplification or revision of the underlying data or a reinterpretation of the legal principles involved. He also explained the U.S. position relating to historic bays and indicated that we would be pleased to consider any information on that or the other issues that the Governor might wish to present.

In October 1971, Senator Ted Stevens of Alaska spoke to the Secretary concerning this problem and began what has developed into a continuing correspondence with Mr. Abshire and Mr. Stevenson on the issue. On May 15, 1972, at the request of Senator Stevens, the Senate Commerce Committee held hearings in Juneau, Alaska on the question of the boundaries in the Alexander Archipelago. Because of his strong interest in the question, we have indicated to him that we would re-examine the charts in light of the other considerations involved in delimiting the boundaries in that area as soon as possible. Senator Stevens met with the Secretary on August 17 to urge that action be taken soon. The Secretary indicated that the problem would be addressed by the Task Force as soon as possible after the end of the Seabed Committee session in Geneva.

II. AVAILABLE INFORMATION

The State of Alaska has submitted to the Department and to the Senate Commerce Committee affidavits of five individuals relating to the historic practice regarding foreign fishing, particularly in the waters within and off the coast of the Alexander Archipelago. These individuals were employed by the Alaska Branch of the U.S. Fish and Wildlife Service during various periods from 1930 to 1961 as administrators at several levels and in one case as a patrol boat captain. All the affidavits indicate that it was the understanding of the fisheries enforcement authorities in Alaska at all times covered by the affidavits that the waters of Alaska in the Alexander Archipelago included all waters within and three miles seaward of lines drawn from headland to headland across all bays, inlets, passes, straits, sounds and entrances. With two exceptions, the affiants indicated that they were unaware of any foreign fishing within these waters during the periods covered

by their affidavits and that such fishing would have been regarded as illegal. (One affidavit stated specifically that such fishing would have violated the 1906 Alien Fishing Act (48 U.S.C. § 243), which prohibits foreign fishing within the "waters of Alaska under the jurisdiction of the United States", with certain provisos). One of the two individuals who recalled any foreign fishing in these waters stated that the only such incidents of which he was aware had resulted in arrest and, in some cases, in the seizure of vessels and gear. The other indicated that, in the only incident of foreign fishing he recalled, a Canadian boat arrested for fishing in the waters of the Archipelago near the international boundary between the United States and Canada was released pursuant to a general policy of leniency in such cases.

The State of Alaska has also submitted a letter from the International Pacific Halibut Commission indicating the absence of any Canadian halibut fishing in the waters of the Alexander Archipelago during the years 1929 to 1970 (apart from one report in Chatham Strait in 1934) except in two statistical sectors which contain halibut grounds which are well off shore. The Commission has not indicated whether all reported fishing in these latter two sectors was in fact offshore, and such information could probably be developed only through a detailed analysis of the Commission's records.

The waters of the Alexander Archipelago do not, according to the charts published by the Task Force Committee, include any areas which are not either territorial sea or contiguous zone. There are, however, substantial areas of contiguous zone extending well into some of the larger straits. Until 1966, when the Contiguous Zone Fisheries Act was passed, foreign fishing would not have been prohibited in these areas had the Committee charts been used as the basis for enforcement.

From about 1964 until the date of issuance of the Committee charts, the Coast Guard used charts which were apparently derived from some hypothetical lines developed by the former Geographer of the Department of State, Mr. Etzel Pearcy. These charts, which were widely known in Alaska, show closing lines drawn from headland to headland across all bays, straits, etc. and the territorial sea limit three miles to seaward of those lines. While it is not clear exactly how these charts came into general use, they do appear to approximate the limits of Alaskan waters as previously understood by Alaskan fisheries enforcement authorities according to the affidavits.

III. SUBSTANTIVE OPTIONS

There are essentially three substantive options open to us concerning the treatment of the Alexander Archipelago:

(1) adhere to the lines shown on the present charts;

(2) assert an historic claim; or

(3) adopt straight baselines.

Option A—Adhere to the Present Charts

The Task Force Committee charts were developed on the basis of a strict application of the provisions of the 1958 Convention on the Territorial Sea and the Contiguous Zone. They do not show closing lines across any straits, channels, or passages, but determine the status of the waters between the islands of the Alexander Archipelago in accordance with the arcs-of-circles method. The effect of this treatment is that the waters of the Archipelago are for the most part territorial sea but contain substantial tongues and pockets of contiguous zone. The seaward limits of the territorial sea and continguous zone are not much different from what they would be if closing

lines were drawn across the entrances to all straits, channels and passages.

The advantage of adhering to the present system is that it does not involve adoption of either straight baselines or historic claims and thus cannot possibly involve any prejudice to positions we might wish to take in the future with respect to the use of these techniques by others.

The disadvantage is that we would be seen as sacrificing what Alaskans regard as their legitimate interests—though the concerns are much more emotional than practical—to gain obscure and uncertain negotiating advantages internationally. There is no dispute that the Alexander Archipelago clearly qualifies for use of the straight baselines system approved by the International Court of Justice in the Norwegian Fisheries Case and recognized in Article 4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. In addition, the Alaskans perceive, rightly or wrongly, that the approach used in the Committee charts amounts to an abandonment of an historically-established practice, if not an internationally-recognized historic claim, with respect to the waters in the Archipelago.

Option B—Assert An Historic Claim

New charts could be issued showing closing lines across the entrances to all straits, etc., in the Alexander Archipelago, thus enclosing all the waters of the Archipelago as internal waters, and the use of such lines could be justified on grounds of historic practice. The international law criteria for such a claim are as follows:

(1) There must have been open, notorious and effective exercise of authority over the waters in question;

(2) The exercise must have been continuous; and

(3) The exercise must have had the acquiescence of foreign nations.

One problem associated with any historic claim in this area is that there has never been a formal communication by the United States Government to other governments of any such claim. It is possible that other governments may have obtained copies of the Coast Guard (Pearcy) maps or other maps indicating that the waters of the Alexander Archipelago were internal waters, but we have no evidence that they had such notice. In 1957-1958, we opposed a Soviet claim of historic title to Peter the Great Bay, which, the Soviet Government asserted, had for years been included as internal waters under its fisheries regulations, on the ground that

> internal regulations of the Russian Government, which were not communicated to the Governments of other States, . . . could [not] be sufficient to establish the degree of acceptance on the part of the rest of the world that would be necessary to justify [an historic claim].
>
> (4 Whiteman, *Digest of International Law* 256-257.)

On the other hand, there is authority for the proposition that certain kinds of acts are sufficient to communicate a claim of sovereignty, including in particular the exclusion of foreign vessels from the area in question. (See, *e.g.*, sources cited in Post-trial brief of the United States in *U.S.* v. *Alaska*, D. Alaska, Civil No. A-45-67, at 40-41.) Moreover, it would not necessarily have to be shown that enforcement activities had been carried out to achieve this end, since the exclusion might have been respected without the need for actual enforcement. What must be shown is that to the extent that action on the part of the State

and its organs was necessary to maintain its authority over the area, such action was undertaken. (*Id.* at 45). In any case, however, there must be some basis for the conclusion that the reason foreign vessels did not enter the waters in question was an understanding or belief that the coastal state claimed jurisdiction.

An historic claim would be limited in any case to the type of authority actually exercised, so that, for example, a State could not claim as internal waters areas in which it had permitted innocent passage as in territorial seas. (*Id.* at 41-42). We understand informally from Coast Guard officers familiar with practice in Alaska that no right of innocent passage has generally been accorded in the Alexander Archipelago. Moreover, vessels entering the waters of the Archipelago *en route* to U.S. ports apparently have been required to give notice before entering those waters. There is apparently an exception in the "Insude Passage" along the Alaskan and Canadian coasts, where U.S. and Canadian vessels (only) transit freely.

A further theoretical question which arises in connection with a possible historic claim to the waters of the Alexander Archipelago is that they cannot really be considered to be an historic "bay", since the waters are not geographically a bay, and are thus not strictly within the exception for historic bays under Article 7, paragraph 6 of the Territorial Sea Convention. However, the problem we face in this respect is analogous to that of Long Island Sound, which we treat as historic waters in spite of the fact that it is a sound rather than a true bay.

The historical situation in the Alexander Archipelago seems to differ in some respects from that in Cook Inlet, the historic status of which is presently under litigation between the State and the Federal Government. We therefore believe it would be possible to assert an historic claim in the Archipelago without in any way undercutting our

position that no such claim exists in Cook Inlet. While the evidence submitted by the State is one-sided and subject to a certain amount of skepticism, the following differences appear from the evidence available with respect to the two situations:

—In the case of Cook Inlet, there was evidence that enforcement authorities, including some of those who have submitted affidavits relating to the Alexander Archipelago, did not consider foreign fishermen to be in violation of U.S. law if they were fishing more than 3 miles from shore in Cook Inlet. By contrast, the affidavits indicate that enforcement authorities considered that foreign fishing in any of the waters of the Alexander Archipelago would have been a *per se* violation of U.S. law because such waters were considered to be under the jurisdiction of the United States. (This is relevant only insofar as it bears on the action enforcement authorities might have taken or been expected to take with respect to warning foreign vessels away from areas regarded as internal waters and enforcing U.S. laws within these waters had foreign vessels entered).

—In the Cook Inlet case, there was clear evidence that foreign fishing had in fact taken place without interference in the areas which the State sought to claim as historic waters. The present evidence with respect to the Alexander Archipelago is to the contrary, although we would not be in a position to evaluate this evidence without full investigation through other sources.

—The evidence in the Cook Inlet case indicated that there had not been enforcement activities against foreign nationals fishing in the contested area in Cook Inlet. By contrast, the present evidence with respect to the Alexander Archipelago, though meager, indicates that there were arrests in all cases of foreign fishing and that penal-

ties were imposed in some cases. The evidence is inconclusive on this point, however, since much of the area in the Alexander Archipelago consists of territorial seas even according to the Task Force Committee charts, and foreign fishing thus would have been prohibited in these areas in any case.

The advantage of using an historic approach is that it would permit us to satisfy the Alaskan concerns regarding the Archipelago without the appearance of a policy shift which would necessarily accompany the adoption of straight baselines. It would also probably make it easier to resist pressure to make claims going beyond the simple closing-line approach which the Alaskans believe is historically justified, since a system of straight baselines *could* encompass a larger area without being unreasonable.

The disadvantage of an historic approach is that it might involve some fairly difficult problems of proof vis-a-vis other governments, since our records may be less than conclusive. Moreover, to the extent that we were unable thoroughly to document our claim, our ability to contest historic claims of others would be somewhat reduced.

Option C—Use Straight Baselines

The Convention on the Territorial Sea and the Contiguous Zone provides in Article 4 that the method of straight baselines may be used in situations in which there is a fringe of islands along the coast in its immediate vicinity and in which the sea areas within the lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. Article 4 also states that account may be taken of economic interests peculiar to the regions concerned, the reality and the importance of which are clearly evidenced by long usage. There is a

requirement that the drawing of such baselines must not depart to any appreciable extent from the general direction of the coast.

The Alexander Archipelago clearly meets the requirements of the Convention (and of the 1951 Norwegian Fisheries Case before the ICJ, of which Article 4 of the Convention is simply a codification) and thus the United States could, consistent with the Convention, utilize straight baselines in that area. The archipelago consists of many islands which are close to the mainland and which are separated in most cases by relatively small bodies of water.

The advantage of the straight baseline option is that it is the simplest and neatest solution. It would avoid any difficulties we might have in proving the existence of an historic claim, and would be clearly justified under existing rules of international law.

One disadvantage is that we might find it more difficult to resist pressure to draw straight baselines in other areas of the Alaska coast and off the coasts of other States such as Maine, Georgia and Louisiana (a key issue in some of these latter areas is that of state vs. federal jurisdiction over seabed mineral resources). We could, however, justify limiting use of straight baselines to this specific situation on the grounds that the lines would reflect economic interests which are evidenced by long usage.

There is also some concern that use of straight baselines might encourage others to apply the concept in a manner inimical to our interests, *e.g.*, by enclosing coastal islands or mid-ocean archipelagoes. On the other hand, given the fact that more than half of the coastal states of the world already utilize straight baselines, it is doubt-

ful that our action would have much effect on the actions of other States in this regard. Moreover, we would certainly be in a good position to distinguish between use of straight baselines in the Alexander Archipelago, which clearly falls within the straight baselines rules of the Norwegian Fisheries Case and the Territorial Sea Convention, and misuse of baselines for purposes not envisioned in the case or the Convention. In short, it is doubtful that our use of straight baselines in the Alexander Archipelago would in any sense be a precedent for broader uses of straight baselines, since it is difficult to think of an area that more clearly qualifies for such treatment under existing rules.

IV. TIMING

In some respects this is a bad time to make any change in the Alaska charts. To the extent that whatever position we take may be considered to weaken our position *vis-a-vis* various claims by other states, it is arguable that any change should await successful completion of the Law of the Sea Conference, which will probably resolve the practical problems in Alaska in any event. Moreover, it seems clear that additional historical research would give us a better understanding of the strength of any claim we might make on historical grounds.

On the other hand, delay has some significant disadvantages. The Alaskans feel strongly that their position with respect to the Alexander Archipelago is rapidly eroding as a result of the issuance of the charts, and that their grievance is exacerbated by the fact that they were not consulted, informed, or given an opportunity to present their views before the charts were issued. The evidence they have submitted, though not a complete historical record in any sense, is sufficiently weighty to cast

doubt on the appropriateness of the lines shown on the present charts. Continued adherence to those lines as the official U.S. position, when we have indicated a willingness to adjust the charts to reflect any valid historic claim, may therefore possess a sufficient appearance of bureaucratic intransigence to create serious congressional difficulties concerning use of the charts in other areas. This is an important election-year issue in Alaska, and Senator Stevens has told us he is under pressure from Senator Magnuson to proceed with further hearings on a broader range of questions concerning issuance of the charts.

Finally, delay in changing the charts can also make it more likely that foreign governments would resist any eventual change. Revision of the charts now can easily be explained as a correction of a mistake. The longer we wait, the more it will be regarded as a change of policy.

V. PROPOSED ACTION

In light of the fact that the Alexander Archipelago so clearly qualifies for the use of straight baselines, we believe such a system should be adopted and the lines drawn in a manner which generally encloses the straits and other waters of the Archipelago. Specifically, the lines should follow the coastlines of the seaward islands but be drawn across the entrances to all straits, channels, etc., running between islands.

We do not believe the use of such a system will have a negative impact on our Law-of-the-Sea negotiating position, nor do we believe a continued refusal to use such a system is justifiable in light of the fact that it is so clearly appropriate to this situation.

While assertion of an historic claim may also be possible, we believe such a course would raise some uncer-

tainties, and possible difficulties with other governments, which can be avoided through the use of straight baselines. At the same time, the fact that such baselines, though clearly permissible in any case, would also reflect economic interests evidenced by long usage, will give us a sound basis for resisting use of straight baselines in other areas of the U.S. coast or by other governments in dissimilar situations.

It would be our intention to issue new, revised charts showing straight baselines as soon as possible and, in the interim, to make a public announcement to the effect that the old charts for the Alexander Archipelago were being withdrawn and that the straits and channels of the Archipelago should be regarded as internal waters.

EXHIBIT 9
Pages 1-3

UNITED STATES
DEPARTMENT OF AGRICULTURE
Office of the Solicitor
Washington 25, D.C.

June 28, 1950

Mr. C. C. Carlson
Office of the Solicitor, U.S.D.A.
901 United States National Bank Building
Portland 4, Oregon

Dear Mr. Carlson:

This is in response to your request for an opinion with respect to the status of reclaimed tidelands within the exterior boundaries of the Tongass National Forest, Alaska.

The lands consists of tidal flats on the east shore of Excursion Inlet which were filled up and used by the Army during the last war. The fill is contiguous to national forest lands and to adjoining tracts in private ownership. The military use has been terminated, and inquiry has been made as to whether this Department has authority to issue permits for private uses of some or all of the reclaimed shore lands.

We agree with your tentative opinion that the lands do not have national forest status, and that this Department has no jurisdiction over them. Our conclusion is explained below.

Excursion Inlet is a long arm of the sea, cutting far into the approximate center of an area which was included within the boundaries of the Tongass by the following

provisions of the proclamation of June 10, 1925 (44 Stat. 2578):

> "I, . . . President of the United states, . . . by virtue of the authority in me vested by the act of . . . March 3, 1891 . . ., and also by the act of . . . June 4, 1897 . . ., do proclaim that the boundaries of the Tongass National Forest are hereby changed to include the areas indicated on the diagram hereto annexed, and forming a part hereof . . . "

The diagrams annexed to the proclamation indicates, as an addition to the forest, an area comprising Excursion Inlet and extensive uplands on both sides. However, the proclamation should be regarded as inoperative with respect to tidelands, since the forest boundaries were enlarged under the authority of laws which relate to the establishment of forest reservations on "public lands" (16 U.S.C. 471, 475), and tidelands in a Territory are not "public lands" of the United States,[1] but are held in trust for the benefit of the State which may be formed in the Territory. Therefore, the proclamation should be construed as making an implied exception of tidelands, in compliance with the statutory limitation upon the establishment of forest reservations, and in conformity with settled principles of policy and law with respect to the status of such lands.[2]

National forest lands on the east side of Excursion Inlet were included [in] a military reservation, under a Public Land Order issued in 1943 which applied to public lands "above the ordinary high tide" (P.L.O. 177; CFR 1946 Supp. 6338). The order provided that military jurisdiction should cease at the end of a stated period

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1 *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894); *Dent v. Alaska Placer Co.*, 177 F. (2d) 10, 17 (1935).

2 *Shively v. Bowlby*, 152 U.S. 1 (1894); *Carrol v. Price*, 81 Fed. 173 (D.C., Alaska, 1896).

following the expiration of the national emergency then existing, and that jurisdiction should then be vested in other Federal agencies, according to their interests of record. The order was revoked in 1949, and jurisdiction over the national forest lands was revested in this Department (P.L.O. 566; 14 Fed. Reg. 1007).

While the military reservation was in effect, the Army used national forest land within its boundaries for military purposes. The Army also filled up tidal flats in front the western (high tide) boundary of the reservation, and used them in conjunction with the lands inside of the boundary. The reclamation and use of shore land was plainly incidental to the military purposes for which the temporary reservation had been established. However, the authority to use the tideland was not derived from Public Land Order 171, or from any statute or land order making specific reference to such lands in Alaska or elsewhere.

It is clear that the tideland was reclaimed for the purpose of enabling the Army to use the area as a seaport during the war. The facts indicate that the reclamation was a military engineering project for temporary use, and that it was not undertaken with a view to severing part of the shore of Excursion Inlet from the great body of tidelands which the United States held in trust for the future State. In the circumstances, there is no occasion to consider whether a severance would have been effected if the flats had been filled with a view to permanent military use (with or without specific authorization by Congress), under an extension of the doctrine that the United States has power to dispose of tidelands within a Territory whenever necessary to carry out public purposes appropriate to the objects for which the United

States holds the Territory,[3] since it appears that the United States did not intend or purport to relinquish its fiduciary title to the land here involved, when it acted through its Army Engineers to raise that land above tide level for temporary use. In this connection, it has been held that the disposition of lands under navigable waters in a Territory is not to be inferred unless the intention to do so was made plain.[4]

It has been held that the doctrine of accretion does not apply to land reclaimed by artificial means from the bed or shore of navigable water,[5] and that the owner of tidelands does not lose his title to the owner of adjacent upland when the tidal flats are reclaimed.[6] It has also been held that where the United States reclaimed submerged land which it owned as proprietor of the bed and shores of the Potomac River opposite the District of Columbia, the filled land remained property of the United States and that title did not inure to the owner of adjacent upland.[7]

The same principles, applied to the present case, lead to the conclusion that:

> (1) Title to the tidal flats did not pass to the owners of adjacent private lands when the United States filled up the flats; (2) title to the flats did not shift from the United States as fiduciary, to the United States as absolute proprietor, when the shore level

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[3] *Shively v. Bowlby*, 152 U.S. 1 (1894); *Brewer-Elliott Oil and Gas Co., United States*, 260 U.S. 77 (1922); *Moore v. United States*, 157 P. (2d) (C.C.A. 9, 1946); Cf. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[4] *United States v. Holt State Bank*, 270 U.S. 49 (1926).

[5] *United States v. Mission Rock Co.*, 189 U.S. 391 (1903).

[6] *Shively v. Bowlby*, 152 U.S. 1 (1894).

[7] *Marine Rwy. Co. v. United States*, 257 U.S. 47 (1921).

> was raised by Army Engineers for temporary use in furtherance of the war effort; and (3) the flats retain the status of tidelands over which this Department has no jurisdiction.

Sincerely yours,

/s/ E. F. Hynatt
Associate Solicitor

EXHIBIT 10
Pages 1-7

EXECUTIVE ORDER

ALASKA

Reference No. 342C
Executive Order No. 4257
Date Signed: 6/27/25

It is hereby ordered that 53 parcels of land and islands situated in Alaska represented upon 45 U. S. Coast and Geodetic Survey charts and made a part of this order described as follows be and the same are hereby reserved for lighthouse purposes subject to any existing valid rights thereto. viz:

1. ALTHORP ROCK, Port Althorp, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8304—Sheet No. 1.

   A small rock about 15 feet high, near middle of Port Althorp.

   (Approx. Long. 136° 21½' W. Lat. 58° 10' N.)

2. AMELIUS ISLAND, Sumner Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8200—Sheet No. 2.

   Small island about 400 yards in diameter 1¾ nautical miles 147° true from Point Amelius.

   (Approx. Long. 133° 52' W. Lat. 56° 10½' N.)

3. BELLKOOFSKI, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8703—Sheet No. 3.

   Southern part of point located 1¼ nautical miles southwesterly from the village of Belkofski; all of that part of the point which lies on the south side of a true east and west line drawn across the point at a distance of 600 feet north true from high water line at the southernmost part of the point.

   (Approx. Long. 162° 03½' W. Lat. 55° 04½' N.)

4. BLOCK ISLAND, Tlevak Narrows, Alaska, shown on U. S. Coast and Geodetic Chart No. 8151—Sheet No. 4.

   Island at Tlevak Narrows, between Prince of Wales Island and Dall Island.

   (Approx. Long. 133° 07' W. Lat. 55° 16' N.)

5. BLUFF ISLAND, Clarence Strait, Alaska, shown on U.S. Coast and Geodetic Survey Chart No. 8160—Sheet No. 5.

   Island about ¾ mile long, one of easterly islands of Kashevarof group.

   (Approx. Long. 132° 53' W. Lat. 56° 10' N.)

6. CAAMANO POINT, Cleveland Peninsula, Clarence Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8102—Sheet No. 6.

   All that part of the extreme south end of Cleveland Peninsula lying on the south side of a true east and west line drawn across the point at a distance of 800 feet north true from the southernmost point of the low water line; including offlying rocks and islets not covered at low water.

   (Approx. Long. 131° 59' W. Lat. 55° 30' N.)

7. CHIGNIK SPIT, Anchorage Bay, Alaska Peninsula, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8822—Sheet No. 7.

Outer part of spit located on east side of Anchorage Bay, about 1 nautical mile northeasterly from the head of the bay, all that part of the spit lying on west side of a true north and south line drawn across the same at a distance of 760 feet east true from the most westerly part of the high water line at the point.

(Approx. Long 158° 23' W. Lat. 56° 17½' N.)

8. CLIFF POINT, Portland Canal, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8051 —Sheet No. 8.

Beginning at a point on low water line, west shore of Portland Canal, 1520 feet in a direct line, southerly, from the center of the concrete slab forming the foundation of Cliff Point Light, thence, west true 1520 feet, thence north, true, 3040 feet, thence east true 760 feet, more or less, to an intersection with the low water line, thence southeasterly and southerly, following the windings of low water line to point of beginning.

(Approx Long. 130° 07½' W. Lat. 55° 41' N.)

9. EAST POINT, Kupreanof Island, entrance to Portage Bay, shown on U.S. Coast and Geodetic Survey Chart No. 8210—Sheet No. 9.

All of that part of the point lying on the west side of a true north and south line drawn across the point at a distance of 600 feet east true from the most westerly part of the low water line at the point.

(Approx. Long. 133° 19' W. Lat. 57° 00' N.)

10. EVANS BAY, Evans Island, Prince William Sound, Alaska, shown on U.S. Coast and Geodetic Survey Chart No. 8523—Sheet No. 10.

Northern part of peninsula on east side of southern part of Evans Bay; all that part of the peninsula lying north of a true east and west line drawn across the same at a distance of 600 feet south true from the most northerly part of the low water line; including offlying rocks not covered at low water.

(Approx. Long. 148° 02½' W. Lat. 60° 03' N.)

11. FALSE POINT PYBUS, Admiralty Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8224, sheet No. 11.

Beginning at a point 1285 feet northwest true from the center of False Point Beacon, a slatted tripod located on the point about one nautical mile southerly from False Point Pybus, thence east true 1170 feet, more or less, to an intersection with the low water line, thence southerly and westerly, following the windings and indentations of the low water line to a point from which point of beginning bears north true, thence north true, 1000 feet, more or less, to point of beginning.

(Approx. Long. 133° 52½' W. Lat. 57° 21' N.)

12. FALSE POINT RETREAT, Lynn Canal, Admiralty Island, shown on U.S. Coast and Geodetic Survey Chart No. 8302—Sheet No. 12.

Beginning at a point near the west shore of Mansfield Peninsula about 2½ nautical miles southerly from Pt. Retreat, from which the center of False Point Retreat Beacon, a slatted tripod anchored to concrete piers, bears west true, distant 900 feet, thence southwest true 900 feet, more or less, to and intersection with the low water line thence northwesterly, northerly and northeasterly, following the windings of the low water line, to a point from which point of beginning bears southeast true, thence southeast true 600 feet, more or less, to point of beginning.

(Approx. Long. 134° 58' W. Lat. 58° 22' N.)

13. FANNIE ISLAND, Port Snettisham, Alaska, shown on U.S. Coast and Geodetic Survey Chart No. 8227—Sheet No. 13.

Island off Prospect Point, about ¼ nautical mile long by about 150 yards wide.

(Approx. Long. 133° 47' W. Lat. 58° 02½' N.)

14. GOAT ISLAND, Tlevak Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8151—Sheet No. 14.

All that part of the southeastern extremity of Goat Island lying south of a true east and west line drawn across the point at a distance of 1200 feet north of the southernmost extremity of the island.

(Approx. Long. 132° 53' W. Lat. 55° 10' N.)

15. GRAND ISLAND, Stephens Passage, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8300—Sheet No. 15.

Beginning at a point on low water line, east shore of Grand Island, 1520 feet in a direct line, southerly, from the center of Grand Island Beacon, a slatted tripod anchored to concrete piers, thence west true 1520 feet, thence north true 1824 feet more or less, to an intersection with low water line, thence southeasterly and southerly, following the windings of the low water line to point of beginning.

(Approx. Long. 134° 06' W. Lat. 58° 06' N.)

16. GRANTLEY HARBOR, Port Clarence, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 9385—Sheet No. 16.

All that part of the sand spit on north side of the entrance to Grantley Harbor, which lies on the south side of a true east and west line drawn across the spit at a distance of 3040 feet north true from the most southerly part of the low water line at the end of the spit.

(Approx. Long. 166° 20' W. Lat. 65° 17' N.)

17. GUIDE ISLAND, Tlevak Strait, Alaska, shown on U. S. Coast and Geodetic Survey No. 8151—Sheet No. 4 (same as for Block Island)

Island in northerly part of Tlevak Strait, between Prince of Wales Island and Dall Island.

(Approx. Long. 133° 04' W. Lat. 55° 13' N.)

18. HALIBUT COVE, Kachemak Bay, Cook Inlet, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8554—Sheet No. 17.

All of Ismailof Island.

(Approx. Long. 151° 14' W. Lat. 59° 35½' N.)

19. HIGH POINT, Woronkofski Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8160 —sheet No. 18.

Beginning at a point on low water line at the head of the first bight easterly of the point and about ⅛ nautical mile distant therefrom, thence south true 1520 feet, thence west true 1100 feet, more or less to an intersection with the low waterline, thence northerly and easterly, following the windings of the low water line to point of beginning.

(Approx. Long. 132° 33' W. Lat. 56° 24' N.)

20. KABUCH POINT, Alaska Peninsula, east side of south end of Isanotski Strait, shown on U. S. Coast and Geodetic Survey Chart No. 8822—Sheet No. 19.

All that part of the point lying on the southwest side of a true southeast and northwest line drawn across the point at a distance of 760 feet northeast true from the center of the concrete slab upon which Kabuch Point Light is constructed; including adjacent rock and reefs not covered at low water.

Approx. Long. 163° 21' W. Lat. 54° 49' N.)

21. KAKUL NARROWS, Peril Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8282 —Sheet No. 20.

Two islets about 150 yards and 100 yards long, respectively, on east side of Kakul Narrows, and all of offlying group of rocks to northward named on the Chart Channel Islets, including all adjacent rocks and reefs not covered at low water.

(Approx. Long. 135° 41' W. Lat. 57° 22' N.)

22. KASAAN BAY, Clarence Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8084— Sheet No. 21.

Unnamed island about 840 yards long by 340 yards wide located near the head of Kasaan Bay 1⅜ nautical miles 66° true from Mound Point.

(Approx. Long. 132° 31¼' W. Lat. 55° 35' N.)

23. LOW POINT, Zarembo Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8160 —Sheet No. 22.

Beginning at a point on low water line 760 feet distant in a direct line, easterly, from the center of Low Point Beacon, located on point of shoreline about one mile easterly from Low Point, thence S. 35° W true 760 feet, thence N. 800 W. 760 feet, more or less, to an intersection with the low water line, thence northeasterly and easterly following the windings of the low water line, to point of beginning.

(Approx. Long. 132° 55½' W. Lat. 56° 27½' N.)

24. KIKTAK ISLAND, Gulf of Alaska, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8513 —sheet No. 23.

Island about one mile off Point Martin, west side of Katalla Bay.

(Approx. Long. 144° 36½' W. Lat. 60° 10' N.)

25. MCFARLAND ISLAND, Tlevak Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8148—Sheet No. 24.

Southern part of one of westerly islands of the group about 2 nautical miles long; all that part of the

island lying south of a true east and west line drawn across the island at a distance of 3040 feet north true from the southernmost part of the high water line at the south end of island; including small islet near southeast side.

(Approx. Long. 132° 55' W. Lat. 55° 03' N.)

26. McNAMARA POINT, Zarembo Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8160—Sheet No. 25.

Beginning at a point on low water line 1520 feet in a direct line northerly from McNamara Point Beacon, a slatted tripod structure, thence east true 1520 feet, thence south true 2500 feet, more or less, to an intersection with the low water line, thence northwesterly and northerly following the windings of the low water line to point of beginning.

Approx. Long 133° 04' W. Lat. 56° 20' N.)

27. MEYERS CHUCK, Clarence Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8124—Sheet No. 26.

Small island about 150 yards diameter located about 200 yards northwest of Meyers Island.

(Approx. Long 132° 16' W. Lat. 55° 44½' N.)

28. MOUNTAIN POINT, Wrangell Narrows, Alaska, shown on U. S. Coast and Geodetic Survey chart No. 8170—sheet No. 27.

Beginning at a point on low water line southerly from the center of Mountain Point Beacon and distant therefrom 1520 feet in a direct line, thence west true 1520 feet, thence north true 3480 feet, more or less, to an intersection with the low water line,

thence southeasterly and southerly following the windings of low water line, to point of beginning.

(Approx. Long. 132° 57½' W. Lat. 56° 44' N.)

29. NIBLACK POINT, Cleveland Peninsula, Clarence Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8102—Sheet No. 6 (Same as for Caamano Point)

Beginning at a point on low water line from which Niblack Point Beacon, a tripod anchored to three concrete piers, bears southeasterly, distant 1520 feet in a direct line, thence northeast true 1520 feet thence southeast true 3040 feet, thence southwest true 600 feet, more or less, to an intersection with low water line, thence northwesterly following the windings of the low water line, to point of beginning.

(Approx. Long. 132° 07' W. Lat. 55° 33' N.)

30. PEEP ROCK, Karheen passage, Alaska shown on U. S. Coast and Geodetic Survey Chart No. 8171—Sheet No. 28.

Small islet located ¾ nautical mile 306° true from the cannery wharf at Karheen.

(Approx. Long 133° 20' W. Lat. 55° 49' N.)

31. POINT ST. MARY, Lynn Canal, north side of entrance to Berners Bay, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8302—Sheet No. 29.

All that part of the point lying south of a true east and west line drawn across the same at a distance of 3040 feet north true from the high water line

at the southernmost part of the point; including offlying rocks not covered at low water.

(Approx. Long. 135° 01' W. Lat. 58° 44' N.)

32. POINT STYLEMAN, Stephens Passage, north side of entrance to Port Snettisham, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8227 —Sheet No. 30.

All that part of the point lying south of a true east and west line drawn across the point at a distance of 700 feet north true from the southernmost part of high water line; including adjacent rocks and reefs not covered at low water.

(Approx. Long. 133° 53½' W. Lat. 57° 58½' N.)

33. POVOROTNI ISLAND, Peril Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8282 —Sheet No. 31.

Island about 200 yards long, off Pogibshi Point, including adjacent rocks and reefs not covered at low water.

(Approx. Long. 135° 33' W. Lat. 57° 30½' N.)

34. PROKODA ISLET, Narrow Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8570 —Sheet No. 32.

Islet in western part of Narrow Strait between Kodiak and Spruce Islands, including rock awash at high tide close to west side of islet.

(Approx. Long. 152° 30½' W. Lat. 57° 54½' N.)

35. PUFFIN ISLAND, Chiniak Bay, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8570—Sheet No. 33.

Island about 2 nautical miles 206° true from the town of Kodiak; including adjacent rocks and reefs not covered at low water.

(Approx. Long 152° 26½' W. Lat. 57° 45' N.)

36. RANGE ISLAND, Popof Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8700—Sheet No. 34.

Island near east side of northern part of Popof Strait.

(Approx. Long. 160° 30½' W. Lat. 55° 21½' N.)

37. REEF ISLAND, Portland Canal, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8051 —Sheet No. 35.

Island about 150 yards wide and about 550 yards long near west shore in southern part of Portland Canal.

(Approx. Long. 130° 12' W. Lat. 55° 05' N.)

38. ROUND ISLAND, Cordova Bay, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8145 —Sheet No. 36.

Southwestern island of the group about 700 yards long, including offlying rocks and reefs not covered at low water.

(Approx. Long. 132° 30½' W. Lat. 54° 46½' N.)

39. ROUND POINT, Southeastern shore of Zarembo Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8160—Sheet 37.

All that part of the point lying on southeasterly side of a true northeast and southwest line drawn across

the point at a distance of 608 feet northwest true from the southeasternmost part of the low water line.

(Approx. Long. 132° 39½' W. Lat. 56° 16½' N.)

40. ROUND ROCK, Frederick Sound, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8200 —Sheet No. 38.

A barren rock about 40 feet high located 3 nautical miles 254° true from the south end of West Brother Island.

(Approx. Long. 133° 56' W. Lat. 57° 15½' N.)

41. SAND POINT, Popof Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8700— Sheet No. 34. (See sheet for Range Island)

All that portion of the extreme western part of Popof Island lying on west side of a true north and south line drawn across the point at a distance of 760 feet east true from the most westerly part of the high water line at the point.

(Approx. Long. 160° 31½' W. Lat. 55° 19' N.)

42. SLEDGE ISLAND, Bering Sea, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 9380—sheet No. 39.

Island 20½ nautical miles westerly from the town of Nome, Alaska.

(Approx. Long. 166° 13' W. Lat. 64° 29' N.)

43. SNIPE ROCK, Ogden Passage, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8280— Sheet No. 40.

Small barren rock occupied by structure of Snipe Rock Light, located 340 yards 147° true from south point of Herbert Graves Island.

(Approx. Long. 136° 10½' W. Lat. 57° 38' N.)

44. SOUTH CRAIG POINT, Zarembo Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8160—Sheet No. 41.

All that part of the point lying on the easterly side of a true north and south line drawn across the point at a distance of 800 feet west true from the most easterly projection of the low water line.

(Approx. Long 132° 37½' W. Lat. 56° 23' N.)

45. SPASSKAIA ISLAND, Icy Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8302— Sheet No. 42.

Two small islets about 30 feet high located about 7¾ nautical miles southwesterly from Point Couverden; including adjacent rocks and reefs not covered at low water.

(Approx. Long. 135° 16' W. Lat. 58° 07½' N.)

46. SUKOI ISLETS, Frederick Sound, Alaska, shown on section of U. S. Coast and Geodetic Survey Chart No. 8200—Sheet No. 43.

Western Island of group.

(Approx. Long. 132° 56' W. Lat. 56° 54' N.)

47. THE SISTERS, Icy Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8302. See sheet for Spasskaia Island. No. 42.

Island about 6½ nautical miles westerly from Point Couverden, about ½ mile long and 150 feet high;

including adjacent rocks and islets not covered at low water, and Sisters Reef, located 1 mile to westward.

(Approx. Long. 135° 15½' W. Lat. 58° 11' N.)

48. THREE HILL ISLAND, Cross Sound, Alaska, entrance to Port Althorp, shown on U. S. Coast and Geodetic Survey Chart No. 8304. See sheet for Althorp Rock No. 1.

Pinnacle rock about 32 feet high on north shore of Three Hill Island occupied by Three Hill Island Light.

(Approx. Long. 136° 24' W. Lat. 58° 11' N.)

49. TURN POINT, Portland Canal, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8051 —Sheet No. 44.

Beginning at a point on low water line, west shore of Portland Canal, 3040 feet in a direct line, southerly from the center of Turn Point Beacon, a tripod anchored to concrete piers, thence west true 1520 feet, thence north true, 5050 feet, more or less, to an intersection with the low line, thence southeasterly and southerly following the windings of low water line to point of beginning.

(Approx. Long. 130° 03½' W. Lat. 55° 26½' N.)

50. TURN ROCK, Tlevak-Strait, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8151—See sheet for Goat Island No. 14.

Small rock, awash at highest tide, located near south shore Goat Island and occupied by Turn Rock Beacon; a spindle and concrete pier.

(Approx. Long. 132° 55' W. Lat. 55° 10' N.)

51. VALDEZ NARROWS, Prince William Sound, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8519—Sheet No. 45.

Beginning at a point on low water line on southeast shore of Valdez Narrows, from which Middle Rock Light bears N. 40° W. true, distance about ⅝ nautical mile, thence S. 35° W true, 6525 feet more or less to an intersection with the low water line on south side of entrance to Narrows, thence northerly and northeasterly, following the windings of the low water line to point of beginning.

(Approx. Long. 146° 39' W. Lat. 61° 04' N.)

52. WEST POINT, Kupreanof Island, entrance to Portage Bay, show on U. S. Coast and Geodetic Survey Chart No. 8210. See sheet for East Point, No. 9.

All that part of the point lying east of a true north and south line drawn across the point at a distance of 600 feet west of the most easterly part of the low water line at the point.

(Approx. Long. 133° 20' W. Lat. 57° 00' N.)

53. WORONKOFSKI POINT, Woronkofski Island, Alaska, shown on U. S. Coast and Geodetic Survey Chart No. 8160. See sheet for High Point, No. 18.

Beginning at a point from which Woronkofski Beacon, a white slatted tripod, bears west true, distant 1520 feet, thence south true 1100 feet, thence west true 1824 feet, more or less, to an intersection with low water line, thence northeasterly and easterly, following the windings of the low water line, to a point from which point of beginning bears

south true, thence south true, 420 feet, more or less, to point of beginning.

(Approx. Long. 132° 30' W. Lat. 56° 26' N.)

CALVIN COOLIDGE

THE WHITE HOUSE,
June 27, 1925

[No. 4257]

EXHIBIT 11

Reference No. 2937

PLO No. 7056
Part Affected: AA-16807
Effective Date: 6/06/94

Federal Register Data

Published:6/06/94
No.: 107

Volume: 59

Page: 29206 & 29207

43 CFR Public Land Order 7056

[AK-932-4210-06; AA-16807]

Partial Revocation of Executive Order No. 4257 Dated June 27, 1925; Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes an Executive Order insofar as it affects approximately 54.47 acres of National Forest System land and 8.91 acres of public land withdrawn for use by the Coast Guard, Department of Transportation, for the Woronkofski Point Lighthouse. The land is no longer needed for the purpose for which it was withdrawn. This action will also open the land within the Forest to such forms of disposition as may by law be made of National Forest System land. The land has been and will continue to be subject to the Tongass National Forest reservation. Upon revocation, the public land will

be subject to the terms and conditions of Public Land Order No. 5180, as amended, and any other withdrawal of record.

EFECTIVE DATE: June 6, 1994.

FOR FURTHER INFORMATION CONTACT: Sue A. Wolf, BLM Alaska State Office, 222 W. 7th Avenue, No. 13, Anchorage, Alaska 99513-7599, 907-271-5477.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), and by section 17(d)(1) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1616(d)(1) (1988), it is ordered as follows:

1. Executive Order No. 4257 dated June 27, 1925, which withdrew National Forest System land and public land for lighthouse purposes, is hereby revoked insofar as it affects the following described land:

Copper River Meridian

Tongass National Forest

A parcel of land located within secs. 5 and 6 of T. 63 S., R. 83 E., described as U.S. Survey No. 1712, excluding the following parcel:

Beginning at a point which is S. 87°21'006" E., 309.65 feet from U.S.L.M. No. 1712, at approximate latitude 56°26'00" N., longitude 132°30'30" W";

Thence S. 23°20'04" W., 219.26 feet;
Thence N. 68°00'42.2" W., 163.49 feet;
Thence N. 58°17'00" W., 69.30 feet;
Thence N. 25°03'00" W., 56.10 feet;
Thence N. 20°08'00" W., 42.24 feet;

Thence N. 39°08'00" E., 50.16 feet;
Thence S. 79°08'00" E., 257.40 feet
Thence N. 66°00'00" E., 56.10 feet to the point of beginning, containing approximately 1 acre.

The area described, less the excluded parcel, contains approximately 54.47 acres of National Forest System land and 8.91 acres of public land, for a total of approximately 63.38 acres.

2. At 10 a.m. on July 6, 1994, the National Forest System land described above will be opened to such forms of disposition as may by law be made of National Forest System land, including location and entry under the United States mining laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law.

At 10:00 a.m. on July 6, 1994, the public land described above will be opened to location and entry under the United States mining laws for metalliferous minerals, pursuant to the term of 30 U.S.C. 49(a) (1988), subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable laws. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: May 17, 1994.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 94-13580 Filed 6-3-94; 8:45 am]

EXHIBIT 12
Pages 1-2

DEPARTMENT OF THE INTERIOR
WASHINGTON

January 24, 1924.

Dr. Charles C. Adams,
Roosevelt Wild Life,
Forest Experiment Station,
Syracuse, New York.

Dear Dr. Adams:

I have your letter of January 21, 1924, and thank you for sending me the interesting paper by Dr. W. S. Cooper on the ecological history of Glacier Bay.

In response to your request as to the proper method of presenting the desire of the Ecologoical Society that Glacier Bay, Alaska, be set aside as a national park or monument, I have to advise as follows: To create a national park requires an act of Congress, and as there are some thirteen bills now pending to create parks, with a vast amount of other legislation, it might be difficult to obtain such an act covering the area to which you refer. National monuments are authorized to be established by the President of the United States, in his discretion, by proclamation, to protect and preserve historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest situated on lands owned or controlled by the United States, the limits of such reservations to be confined to the smallest area compatible with the proper care and management of the objects to be protected (act of June 8, 1906). Such monuments, when established, fall automatically under the care, protection, and control of the Department of the Government having

jurisdiction of the land, i.e., if a part of the public domain, they are under the supervision of this Department; if within the limits of a national forest, under the jurisdiction of the Secretary of Agriculture; if within a military reservation, under the jurisdiction of the Secretary of War.

Apparently, from the map of Alaska issued by the General Land Office in 1917, Glacier Bay area is a part of the public domain, and under the jurisdiction of this Department. The method of procedure in applying for the creation of a national monument covering this area would be to address an application or petition to the President of the United States, through the Secretary of the Interior, setting forth the desire for the establishment of the monument and the reasons therefor, particularly the historical or scientific features which, in your opinion, would justify the establishment of the monument. Such a petition could be presented on behalf of the Ecological Society, signed by its officers, and might be indorsed or concurred in by any others interested. I am sure that the same will be given careful and sympathetic consideration by Secretary Work.

With regards and best wishes, I am,

Sincerely yours,

(Sgd) E.O. Finney

First Assistant Secretary.

EXHIBIT 13

THE NEW YORK STATE COLLEGE OF FORESTRY
AT SYRACUSE UNIVERSITY
FRANKLIN MOON, DEAN

THE ROOSEVELT WILD LIFE
FOREST EXPERIMENT STATION

CHARLES C. ADAMS, DIRECTOR

SYRACUSE, N.Y.
January 28, 1924.

Mr. E. C. Finney,
First Assistant Secretary,
Department of the Interior,
Washington, D. C.

Dear Mr. Finney: -

I wish to thank you very much indeed for your letter of January 24 indicating how the Ecological Society should proceed with its plans for the Glacier Bay National Monument. I have sent on this information to Dr. Cooper so that all the materials can be sent on very soon to Secretary Work. I appreciate very much your courteous assistance in this matter.

Very sincerely,

CHAS. C. ADAMS

CCA:VAB

EXHIBIT 14
Pages 1-2

"An Undisturbed Area in Every National Park
and Public Forest"

ECOLOGICAL SOCIETY OF AMERICA

COMMITTEES ON PRESERVATION
OF NATURAL CONDITIONS

Composed of One Hundred Members Distributed in the
Various States and Provinces of the United States
and Canada

W. G. WATERMAN, SENIOR CHAIRMAN

* * * *

February 21, 1924.

President Calvin Coolidge,
Washington, D.C.

Dear Mr. President:

I have the honor to transmit for your consideration a group of documents relating to a project to establish a National Monument at Glacier Bay, Alaska. This plan was initiated at the Boston meeting of the Ecological Society of America in December, 1922, at which time a committee was appointed to consider the feasibility and advisability of establishing such a reservation. This committee reported favorably at the Cincinnati meeting in December, 1923, and was continued, with instructions to represent the Society in an effort to bring about a consummation of the plan.

The documents submitted are: first, a statement prepared by the Committee of the Ecological Society, includ-

ing recommendations in summary form, resolutions passed by the Society and a presentation of data upon which the recommendations are based; second, a reprint of a paper by the Chairman of the Committee describing certain scientific features of the region; third, letters in support of the project, contributed by Governor Gifford Pinchot of Pennsylvania and Dr. Harry Fielding Reid of Johns Hopkins University, the eminent authority on glaciers, who made the first thorough study of the region under consideration. The plan has been presented to numerous organizations and individuals, and these have been requested to transmit their views on the matter directly to the Secretary of the Interior and the Director of the National Park Service.

The Ecological Society feels that, as a National Monument, the area should be retained within the jurisdiction of the Department of the Interior, as it might in the future be desirable to convert it into a National Park.

It should be stated, for your information, that the Ecological Society of America is an organization of more than six hundred members, largely professional naturalists, representing the leading scientific and educational institutions of the United States and Canada.

Very respectfully,

THE ECOLOGICAL SOCIETY OF AMERICA

E.N. Transeau
President.

[illegible] Secretary

Williams S. Cooper Chairman for Glacier Bay, Committees on Preservation of Natural Conditions

EXHIBIT 15

EXECUTIVE ORDER

ALASKA

It is hereby ordered, under authority of the act of Congress approved June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), that the public lands lying within the hereinafter described boundaries be, and they are hereby, temporarily withdrawn pending determination as to the advisability of including the same in a national monument, subject to the conditions of said acts and to all prior claims lawfully initiated and maintained:

Beginning at the western extremity of Cape Fairweather on the west coast of Alaska, thence in a northeasterly direction to the summit of Mt. Fairweather on the international boundary between Canada and the United States, thence following such boundary easterly, northeasterly and easterly to Monument No. 157 of the survey of such boundary by the International Boundary Commission approved June 9, 1923; thence east following the latitude of said monument to an intersection with the right bank of Chilkat Inlet; thence southerly along the right banks of said inlet and Lynn Canal to Icy Strait; thence westerly along the north shores of Icy Strait and Cross Sound to the Pacific Ocean; thence in a general northwesterly direction along the shore of the Pacific Ocean to Cape Fairweather, the place of beginning containing approximately 2,560,000 acres.

CALVIN COOLIDGE

THE WHITE HOUSE,
April 1, 1924.

[No. 3983.]

EXHIBIT 16
Pages 1-2

GLACIER BAY NATIONAL MONUMENT
ALASKA

By the President of the United States of America
A Proclamation

Whereas, There are around Glacier Bay on the Southeast coast of Alaska a number of tidewater glaciers of the first rank in a magnificient setting of lofty peaks, and more accessible to ordinary travel than other similar regions of Alaska,

And, Whereas, The region is said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century,

And Whereas, This area presents a unique opportunity for the scientific study of glacial behavior and of resulting movements and development of flora and fauna and of certain valuable relics of ancient interglacial forests,

And Whereas, The area is also of historic interest having been visited by explorers and scientists since the early voyages of Vancouver in 1794, who have left valuable records of such visits and explorations,

Now, Therefore, I, CALVIN COOLIDGE, President of the United States of America, by virtue of the power and authority in me vested by section two of the act of Congress entitled: "An Act for the preservation of American Antiquities", approved June 8, 1906 (34 Stat., 225), do proclaim that there is hereby reserved from all forms of appropriation under the public land laws, subject to all prior valid claims, and set apart as the Glacier Bay National Monument, the tract of land lying within the following described boundaries, to wit:

Beginning at the most southerly point of North Marble Island in approximate latitude 58° 40′ north and approximate longitude 136° 4′ west as shown on Coast and Geodetic Survey chart No. 8306; Thence southeasterly to the most westerly point of the largest island at the entrance of Bear Track Cove in approximate latitude 58° 34′ north and approximate longitude 135° 56′ west; thence following the mean high water of the southerly shore to the most easterly point of said island; thence east on a parallel of latitude to the crest of the divide between the waters of Bear Track Cove and Bartlett Cove; thence northeasterly along this divide to the summit of the divide between the waters of Excursion Inlet and Glacier Bay; thence northerly along this divide to the crest of the divide between the waters of Glacier Bay and Lynn Canal; thence northerly and westerly along this divide to the International Boundary line between Alaska and British Columbia; thence southwesterly along the International Boundary line to the summit of Mt. Fairweather; thence southeasterly to the summit of Mt. Lituya; thence easterly and southerly along the divide between the waters of the Pacific Ocean and the waters of Glacier Bay and Icy Strait to the summit of Mt. La Perouse; thence easterly across Brady Glacier to the summit of the mountain

marked 4480 on the Coast and Geodetic Survey chart No. 8306 in approximate latitude 58° 33′ north and approximate longitude 136° 38′ west; thence northeasterly to the summit of the mountain marked 4030 on said chart in approximate latitude 58° 34′ north and approximate longitude 136° 33′ west; thence northeasterly to the most southerly point on the north shore of Geikie Inlet; thence northeasterly following the mean high water of this shore to the most easterly point of land at the entrance of Geikie Inlet, thence southeasterly to the place of beginning, containing approximately 1,820 square miles.

Warning is hereby given to all unauthorized persons not to appropriate or injure any natural feature of this monument or to occupy, exploit, settle or locate upon any of the lands reserved by this proclamation.

And I do also proclaim that my order No. 3983 of April 1, 1924, withdrawing the public lands within the hereinafter described limits pending determination of the area therein which should be set apart for national monument purposes, is hereby revoked:

Beginning at the western extremity of Cape Fairweather on the west coast of Alaska, thence in a northeasterly direction to the summit of Mt. Fairweather on the international boundary between Canada and the United States, thence following such boundary easterly, northeasterly and easterly to Monument No. 157 of the survey of such boundary by the International Boundary Commission approved June 9, 1923; thence east following the latitude of said monument to an intersection with the right bank of Chilkat Inlet; thence southerly along the right banks of said inlet and Lynn Canal to Icy Strait; thence westerly along the north shores of Icy Strait and Cross Sound to the Pacific Ocean; thence in a general northwesterly direc-

tion along the shore of the Pacific Ocean to Cape Fairweather, the place of beginning containing approximately 2,560,000 acres.

And I do further proclaim and make known that pursuant to Public Resolution No. 29 of February 14, 1920 (41 Stat., 434), as amended by Resolutions Nos. 36 and 79, approved January 21 and December 28, 1922, respectively (42 Stat., 358, 1067), it is hereby ordered that the public lands in that portion of the area last above described not included in said Glacier Bay National Monument by this proclamation, subject to valid rights and the provisions of existing withdrawals, shall be opened only to entry under the applicable homestead laws by qualified ex-service men of the war with Germany, under the terms and conditions of said resolutions and the regulations issued thereunder, for a period of ninety-one days beginning with the sixty-third day from and after the date hereof, and thereafter to appropriation under any public land law applicable thereto. Subsequent to the date hereof and prior to the date of restoration to general disposition as provided herein, no rights may be acquired to the lands so restored by settlement in advance of entry, or otherwise except strictly in accordance herewith.

The Director of the National Park Service, under the direction of the Secretary of the Interior shall have the supervision, management, and control of the Glacier Bay National Monument, as provided in the act of Congress entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916 (39 Stat., 535), as amended June 2, 1920 (41 Stat., 732).

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

[SEAL] DONE at the City of Washington this 26th day of February in year of our Lord One thousand nine hundred and twenty-five, and of the Independence of the United States of America the one hundred and forty-ninth.

CALVIN COOLIDGE

By the President:
CHARLES E. HUGHES
Secretary of State

[No. 1733]

EXHIBIT 17

The President

EXCLUDING CERTAIN LANDS FROM THE TONGASS NATIONAL FOREST AND ADDING THEM AND OTHER LANDS TO THE GLACIER BAY NATIONAL MONUMENT—ALASKA

BY THE PRESIDENT
OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS it appears that certain public lands, part of which are within the Tongass National Forest, adjacent to the Glacier Bay National Monument, in Alaska, have situated thereon glaciers and geologic features of scientific interest; and

WHEREAS a portion of the aforesaid public lands contiguous to the said monument are necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands included within the said monument; and

WHEREAS it appears that it would be in the public interest to reserve all of the aforesaid public lands as a part of the said monument:

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, under and by virtue of the authority vested in me by the act of June 4, 1807, 30 Stat. 11, 34, 36 (U. S. C., title 16, sec. 473), and the act of June 8, 1906, c. 3060, 34 Stat. 225 U. S. C, title 16, sec. 431), do proclaim that all of the following-described lands which lie within the Tongass

National Forest, in Alaska, are excluded therefrom, and that, subject to valid existing rights, all the following-described lands in Alaska are hereby added to and made a part of the said Glacier Bay National Monument:

Beginning at the summit of Mount Fairweather, on the International Boundary line between Alaska and British Columbia; thence southeasterly along present southern boundary of Glacier Bay National Monument to the point of the divide between the waters of Glacier Bay and Lynn Canal where said divide is forked by the headwaters of Excursion Inlet; thence easterly and southeasterly along the divide between the waters of Excursion Inlet and Lynn Canal to a point in approximate latitude 58° 27' N., longitude 135° 18' W., where said divide meets a subsidiary divide between streams flowing into Excursion Inlet; thence westerly and northwesterly along said subsidiary divide to the east shore of Excursion Inlet; thence due west to the center of the principal channel of Excursion Inlet; thence southerly along the center of the principal channel of Excursion Inlet to its junction with the Icy Passage; thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass, and Cross Sound to the Pacific Ocean; thence Northwesterly following the general contour of the coast at a distance of 3 nautical miles therefrom to a point due west of the mouth of Seaotter Creek; thence due east to the north bank of Seaotter Creek; thence due east to the north bank of Seaotter Creek and easterly along the north bank of Seaotter Creek to its headwaters; thence in a straight line to the summit of Mount Fairweather, the place of beginning. Containing approximately 904,960 acres.

Warning is hereby expressly given to all unauthorized persons not to appropriate, injure, destroy, or remove

any feature of this monument and not to locate or settle upon any of the lands thereof.

The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of the monument as provided in the act of Congress entitled "An Act to establish a National Park Service, and for other purposes," approved August 25, 1916, 39 Stat. 535 (U. S. C., title 16, secs. 1 and 2), and acts supplementary thereto or amendatory thereof.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 18" day of April in the year of our Lord nineteen hundred and thirty-nine, and of the Independence of the United States of America the one hundred and sixty-third.

[SEAL]

FRANKLIN D. ROOSEVELT

By the President:

CORDELL HULL
The Secretary of State.

[*No. 2330*]

[*F.R. Doc. 39-1369; Filed, April 20, 1939; 12:44 p.m.*]

EXHIBIT 18
Pages 1-5

UNIVERSITY OF MINNESOTA
COLLEGE OF LITERATURE, AND THE ARTS
Minneapolis

DEPARTMENT OF BOTANY Feb. 27, 1934.

Mr. H. C. Bryant,
Office of International Parks,
Department of the Interior
Washington, D. C.

Dear Mr. Bryant:

I am sending you several publications of mine relating to the Glacier Bay area. Can you tell me if there have been any recent developments with regard to making the area a national park. Having been more or less instrumental in having it set apart as a national monument, I am naturally interested in its future. A couple of years ago Senator Walcott had such a project in mind, involving a considerable increase in the area included.

Very truly yours,

W. S. COOPER,
Professor,
Department of Botany

WSC:EMF

OUR AMERICAN GRIZZLIES NEED A HOME

[PHOTO OMITTED]

This beautiful view of virgin forest, unspoiled lakes and rugged peaks is typical of Admiralty Island, which is proposed to set aside as a sanctuary for Alaskan grizzly and brown bears, and to hold inviolate for nature lovers as well.

THE LAST OF America's big bears—the grizzlies and brown bears of Alaska—face extinction. Of the famous California grizzly bears the few remaining specimens disappeared recently, and only isolated stragglers are left elsewhere in the United States. Prompt and decisive action alone will prevent the grizzlies and brown bears in Alaska, their last stronghold in America, from disappearing down the same trail of unreasoning butchery.

Congress will soon have before it in the Admiralty National Park Bill, which would make a national park and bear sanctuary of Admiralty Island and part of Baranof Island, opposite Juneau, Alaska. The story of this bill is a tale of hard fighting against the injustice that ignorance can bring about. Unless this bill is passed, the last of America's magnificent great wild animals may soon join other species indexed as "now extinct" in the annals of natural history—and for no better reason than that as a nation we awoke to their desperate plight too late to save them from unjustified and unlimited slaughter.

Individual efforts on behalf of these much misrepresented animals have been carried on for some years in various parts of the country. Writers, conservationists, lovers of wild life, and societies such as the New York Zoological Society and the American Society of Mammalogists have realized the danger and have taken up the cudgels, each in its own way. Now, through the National

Association of Wild Life Conservationists, it is proposed to bring together in one great cooperative effort the activities of these various individuals and groups, so that there can be put behind the Admirality National Park Bill a coordinated energy that will drive it forward to success.

NEITHER FEROCIOUS OR VICIOUS

Let us outline briefly the case of the American big bears. These are the reasons advanced in defense of the present quasi-official and generally practiced policy of killing of the Alaskan bears without regard to consequences of extermination. By the unknowing it is claimed that these bears are innately vicious—that they attack and kill men without provocation; that they are stock killers; that they rob food caches. Give the average man or woman a list of wild animals, with instructions to rate them according to ferocity, and you will find in almost every case the grizzly bear credited—or, rather, discredited—with a place very near the top. Public opinion is generally based on bedtime stories in which the grizzly features as the villain, and on tales of hunters who return from Alaska ready and willing to tell newspaper reporters how, in the face of extreme peril, they shot big bears.

Let us answer these charges in turn. First as to the big bears' ferocity. Suart Edward White, well known writer and naturalist, states that in the course of his many visits to Alaska to gather material for articles on wild life, he has talked to scores of salmon watchers whose work brings them into close contact with one to a dozen grizzly and brown bears every day of their season. These men without exception report that they have never had any trouble with the great creatures.

"All of these watchers, like sensible men, conduct their business armed," Mr. White says, "but I have yet to hear of one compelled to use his rifle."

Mr. White further comments that to his knowledge the only men who have had trouble with big bears are "those who, previously impressed with the ferocity legend, have hastily opened fire, sometimes with inadequate weapons, sometimes with ill aim."

Mr. John M. Holzworth, president of the National Association of Wild Life Conservationists and author of "Wild Grizzlies of Alaska" and "Baby Bears," spent three seasons in Alaska photographing more than 200 big bears at ranges from eight to 200 feet. Not once was he attacked.

Investigation of reported attacks of grizzlies or brown bears upon human beings have almost invariably divulged that the "attacking" bear was first wounded or cornered by the hunter and charged in a courageous attempt at self defense. No man can deny any animal's right to fight back when attached: any other course of action would be cowardly—and the great grizzly and brown bears are not cowards.

WHAT LEADING EDITORS SAY—

PROTECTION FOR BEARS

"Protect bears from people? Don't you mean protect people from bears?" No, gentle reader, we mean protect bears from people. The bears are Alaska brown and grizzly bears on Admiralty and Chicagof Islands opposite Juneau. Creatures of great dignity and intelligence, they are harmless unless attacked or cornered. Yet they are threatened with extinction . . . It would be a pity for the brown bear and the grizzly to go the way of many other magnificent specimens of animal life. Admiralty and Chicagof Islands, lying at the very entrance to Alaska, are ideal as sanctuaries and at the same time easily accessible, so that the tourist and the naturalist can visit them and see their wild life, floral and fauna, without difficulty. The bears which make these islands their homes should be saved from the fate of the buffalo."

EVENING POST, New York, N.Y., Jan. 22, 1932.

LET CONGRESS ACT

"Congress ought to respond promptly and favorably to the request of the New York Zoological Society committee which asks that a sanctuary for the grizzly and brown bears be established on Admiralty and Chicagof Islands.

"For these great bears, the largest on the North American continent, and in fact the largest in the world, are in grave danger of extermination.

"The Alaska bears take but small toll of animal life in the woods. They do not threaten man unless he corners or wounds them. As magnificent specimens of the American fauna they are entitled to the protection which Mr. Holzworth's committee asks for them. If Congress fails to give it they will inevitably go the way of the bison."

DAILY EAGLE, Brooklyn, Jan. 23, 1932.

PROTECT THE BEARS

"The bear stories of childhood, wherein someone always protected human beings from these large American animals, have been turned about. Now human beings are trying to protect the bears by law. The bear is one of the most intelligent of all wild animals. He should be saved from extinction."

NEWS, Albany, N.Y., Jan. 19, 1932

PROTECT THE AMERICAN GRIZZLY

"Advocates of the preservation of wild life on the North American continent have had to wage persistent battle for their cause. Much has been accomplished in that field of conservation, with the aid of protective game laws and in the creation of sanctuaries, but more must be accomplished in certain important species are to be saved.

"There are, to be sure, thousands to men, in and out of Alaska, who will say that the country could get along very well without grizzlies. But with the passing of these and other wild game species America would have no great outdoors left. The wilderness would be tamed forever. And something of value would be lost that could never be restored."

JOURNAL, Dallas, Tex., Jan. 21, 1932

SAVE THE BEAR

. . . "The appeal of the people who want to save the bear has our sympathy, and we suggest that our congressional delegation support the bill that will have for its purpose the protection of the big Alaska brutes. People do not need the skins. It would be better perhaps if more folks patronized the cotton mills and woolen mills and let the wild life have a fair show where there is still a fair supply of it."

DAILY CAPITOL JOURNAL, S. D., Jan. 21, 1932

SHOULD NOT BECOME EXTINCT

"The New York Zoological Society is supporting a bill In Congress to create a sanctuary for Alaskan brown and grizzly bears on Admiralty and Chicagof Islands.

"If the project succeeds, the islands will be much visited in the near future by tourists. If it fails, the bears may become extinct.

"The animals should be protected from the fate which will overtake them if no sanctuary is provided. Small animals are tenacious of life even in densely populated areas and without protection. Weasels thrive even in the outskirts of cities, and foxes contrive to live in city parks. But huge animals cannot survive, even in the remoter countries of our modern world, without the succor of our governments."

TIMES, Louisville, Ky.

THE NEW YORKER AGREES

"A committee has approached us to ask if we would help in the work of protecting and preserving the brown and grizzly bears of Alaska. Need we say we will? Once we spend six weeks in Alaska, and although we never happened to have an opportunity to protect a grizzly from the predatory old paper-pulp interests, which threaten their extinction, we always stood ready to. We are still ready.

"The islands of the Inside Passage, where the bears live, seemed to us lovely, perfect. We should not want one of them changed by the extinction of so much as one bear, or the establishment of even one pulp mill. Grizzlies are certainly less dangerous than the tabloids that are printed from paper pulp . . ."

THE NEW YORKER, Jan. 23, 1932

BEAR PRESERVES

"The Newark Evening News editorially says that 'Congress should take a few minutes off from its consideration of the bear market to pass the bill creating island sanctuaries in Alaska, for the grizzly and brown bears. These great, intelligent and dignified creatures are facing extinction . . . Out of all the huge and unused territory the United States possesses, a few square miles can certainly be allotted to the bears." . . . as the Newark, News suggests, Congress should turn for a few minutes from Wall Street and look after the bears of Admiralty and Chicagof."

HOME NEWS, New Brunswick, N. J. Jan. 22, 1932

THE BEARS OF ALASKA

"Zoological societies have their hands full in trying to preserve wild life in America. Many hunters are rapacious, while legislators are hard to convince of the necessity of protective laws. The case for the brown and grizzly bears of Alaska and the near-by islands is being presented with force by the New York organization.

"Much of the animosity against them, as the Chairman of a Committee of the society, Mr. John Holzworth, points out, is due to ignorance. Both the brown and grizzly bear, though more belligerent than the black, are harmless unless attacked. He says that he spent three successive summers in the heart of the country where they roam freely, taking photographs at ranges of from eight to 150 feet, without being once attacked . . . .

"As The Sportsman says, the game act does not apply to natives, some of whom have gone so far as to resort to poison. There is thus real danger that the bears will become extinct, as the buffaloes would be if nothing had been done to protect them. The Sportsman suggests that the islands opposite Juneau, particularly Admiralty Island,

offer unique advantages as a permanent reserve for all four species of Alaskan bears. The alternative is the sure, though gradual, extinction of them all. It is for Congress to act in this matter, and its action should not be too long postponed."

ENQUIRER, Philadelphia, Pa., Jan. 27, 1932

A PRESERVE FOR ALASKA BEARS

"The most impressive natives of Alaska are the big brown and grizzly bears. Having unfortunately, few friends in the territory, the bears are being killed off at a rate which they cannot withstand. In order that a fair number may survive, a bill is to be introduced in Congress to provide sanctuary for these superb animals on Admiralty and Chicagof Islands near Juneau, the Alaska capital. Many friends of wild life, committees and individuals, are heartily in favor of giving the big bears a secure range of their own.

"They have almost no protection under the present laws, for, excepting in a few small areas, any resident may kill any number of grizzly and great brown bears at any time of the year . . . the bears are being hunted down. On Admiralty Island there are at least three thousand brown and grizzly bears, probably more than half the whole number of the animals in Alaska. On Chicagof Island there are not a few. These islands are most suitable for the proposed reserve. They are easily accessible to naturalists and tourists who like to rough it and the terrain is perfectly adapted to the bears' habits. Surely out of all Alaska a small principality can be saved for its grand aborigines."

HERALD TRIBUNE, New York, Jan. 19, 1932

The above editorials are only a few out of many which have been printed by the daily and magazine press of the country in behalf of the Alaskan bear sanctuary

NOT KILLERS OF STOCK

The charge that the grizzlies and "brownies" are generally stock killers is equally unbased. In the first place, these bears, although they are known as "carnivorous," eat many foods. They dig for roots, eat grass, hunt for berries, fish in the streams when the salmon run, devour insects, grubs, larvae, mice, small rodents, decayed carrion or freshly killed flesh, with equal relish. That the big bear is not a killer of large animals is attested by the reports of naturalists and visitors to Alaska who have seen deer feeding unconcernedly when a grizzly passed within twenty yards in plain view, or mountain goats gather curiously to watch a bear dig for a marmot. Not long ago, in the case of bear shot as a stock killer, post mortem examination revealed that the bear had been subsisting wholly on a vegetable diet. Post mortem vindication, however, was of little value to the bear.

In connection with this charge of stock killing, it is relevant to comment that Admiralty and South Eastern Baranof Islands, the proposed sanctuary for bears, are uninhabited except for a small Indian village, and are unsuited for stock raising by reason of the terrain.

[PHOTO OMITTED]

John M. Holzworth makes good his contentions about the friendly nature of bears by entering the den at the Bronx Zoo and holding out a few tid bits to the great Alaskan brown bears.

It is true that bears will rob food caches whenever they get the chance. They are very inquisitive and they have tremendous appetites. The answer to this problem is very

simple. Construct caches that are inaccessible to bears; any experienced outdoor man knows how to do it.

The stories of hunters attacked by bears are always based on trouble that followed when the bear was cornered or attacked. Newcomers in bear country frequently become frightened at sight of a bear and fire "in self defense" when the bear has shown no signs of belligerence. Bears' eyesight is poor. They will stand up on their hind legs to get a better view of the visitor in their territory, and many a hunter believing the fiction that a bear charges on his hind feet, has opened fire hastily and with poor aim, laying himself open to the rightly dreaded fury of a wounded big bear.

Stewart Edward White has observed that with elementary common sense such accidents are avoidable, and that hundreds of sportsmen, including many women, kill their bear as safely as they would a cow in a pasture. He adds, "Indeed, in my opinion, the shooting of these animals is no great feat . . . I myself, had I been an Alaskan and so inclined, could probably have killed every one of the fifty I encountered last summer."

LAW GIVES LITTLE PROTECTION

What is the present legal status of these Alaskan bears? In 1902, due largely to efforts of the New York Zoological Society, there was passed an Alaskan game act which gave at least theoretical protection. Under its terms Alaskan residents and visiting sportsmen were limited to the killing of two or three bears each year, depending on the locality. In 1930 all protection was virtually withdrawn. Although visiting sportsmen are still held to their former limits, at the present time any resident of Alaska may kill any number of grizzly and brown bears except in several small areas, and in these a resident may kill any bear at any

time when *in his judgment* it is dangerous to life or property.

An investigator for the Senate Committee on Wild Life Resources recently returned from Alaska and reported that on Kodiak Island, which gave its name to the well-known Kodiak bear, the slaughter has reduced the bear population to a "low ebb." On most of the Alaska Peninsula they have likewise reached a point very near extermination.

SAVING BEARS SAVES FOREST

Fortunately there remain two areas, Admiralty and Baranof Islands, which so far have escaped the blight of wholesale slaughter, are well populated with both grizzly and brown bears, and are eminently suitable for both a national park and a bear sanctuary. At present these two islands, well known to those who have cruised the famous Inside Passage, have magnificent virgin forests of spruce, pine and hemlock, which the Admiralty National Park Bill would preserve for all time from lumbering depredation.

Admirality Island, almost 100 miles long and 20 to 40 miles wide, is estimated to have approximately half the big bear population of Alaska—about 3,000 brown and grizzly bears. Above the timberline tower great snow-covered peaks with glaciers along their sides glistening in the clear sunlight. Baranof, even more mountainous than Admiralty, rises 2,000 feet higher at its highest peak, offering scenic beauty comparing only to that of the Swiss Alps.

Both these islands are easily accessible—only six days' journey from New York City—and if opened up as a national park would attract into Alaska many visitors who

at present are diverted at Juneau from United States territory into the Yukon district. The very fact that Admiralty and Baranof are islands is in itself favorable to their selection as sanctuaries, as the bears that inhabit them could not in any way annoy Alaskan residents nor impede commercial development of the territory in general.

WILL OPEN TOURIST TRAILS

The plan of the Admiralty National Park Bill is to open up trails through these two islands, so that visiting tourists and naturalists may in the company of expert guides, enjoy this little known wonderland of virgin country and see and study the last of the great American wild animals in their native state.

These islands are already owned by the United States government and are not bringing in any revenue that would be cut off by this act. To develop them as a national park accessible to vistors would cost about $20,000 —an expenditure soon returned by tourist trade.

HOW TO HELP

For a year the fight in behalf of the Alaskan bears has been conducted by a joint committee of the New York Zoological Society and the American Society of Mammalogists, with the cooperation of the press and nature lovers in general. To bring the project to a successful issue and to head up in one body the conservation efforts of friends of wild life which hitherto have been scattering and sporadic, there has been incorporated under the laws of New York the National Association of Wild Life Conservationists, of which Mr. John M. Holzworth is founder and president.

Its chief aim, as expressed in its charter, is "to cooperate with the National and State Governments and their various

agencies and departments and regularly organized conservation and game societies and associations, in disseminating knowledge relating to animals, birds, and fish, and furthering their protection and conservation through constructive and protective laws and regulations, and the establishment of proper and adequate sanctuaries, preserves, national parks and primitive forest areas."

Nothing will help so much as taking membership in this organization, dedicated to the task of carrying on. The grades of membership are: Benefactor, upon payment of $5,000; Founder, $1,000; Patron, $250; Life, $50; Sustaining Member, $10; Annual, $2. Checks to Brian Mannix, Treasurer.

THE NATIONAL ASSOCIATION OF WILD LIFE CONSERVATIONISTS, INC.
51 Pine Street, New York City

Request your senators and congressmen to send you copy of the printed report of the hearing on Alaska bears before the U. S. Senate Committee on Wild Life Resources, and also to support the Admiralty National Park Bill.

Oh! Mister Hoover! Help! Help!

[CARTOON OMITTED]

LET ME KILL
'EM OFF SO I
CAN PROMOTE
ANOTHER
PAPER MILL

The Last of
The Alaskan
BROWN BEARS

WHEN WE HAVE SO MANY PAPER MILLS NOW,
THAT THE INDUSTRY IS ALMOST BANKRUPT

[CARTOON OMITTED]

OVER
PRODUCTION
OF PAPER

(Copyright 1932 New York Tribune, Inc.
Courtesy, N.Y. Herald-Tribune)

Typical of the editorial sentiment that the plea in behalf of the Alaskan bears has aroused in the press of the country is the above powerful cartoon by Jay N. Darling ("Ding") which first appeared in the New York Herald-Tribune. It pictures, as mere words cannot, one important factor in the strenuous fight to save the Alaskan grizzly and brown bears.

EXHIBIT 19
Pages 1-5

THE WHITE HOUSE
WASHINGTON

June 6, 1934.

MEMORANDUM FOR

THE SECRETARY OF THE INTERIOR

This horrifies me as much as it does my friend David Wagstaff. If these bears come under your jurisdiction, will you please have the matter checked up? It seems to me that that kind of slaughter ought to be stopped.

F. D. R.

98e

June 6, 1934.

Dear Dave:—

You are dead right about the slaughter of those bears. I am starting the machinery to stop that sort of thing from happening again.

Always sincerely,

David Wagstaff, Esq.,
Tuxedo Park
New York.

99e

June 30, 1934.

My dear Mr. Wagstaff:

At the request of the President, I am sending you the enclosed copy of a letter to him from the Secretary of the Interior.

Very sincerely yours,

Louis McH. Howe
Secretary to the President

David Wagstaff, Esq.;
Tuxedo Park,
New York.

Enclosure

100e

David Wagstaff
Tuxedo Park
New York

May — 30th 34.

Dear Franklin—

The enclosed speaks for itself—I only hope that something can be done to limit the slaughter of these great bears so that they will not follow the pigeon and the bison through our own lack of interest.

With best regards

Sincerely

DAVID WAGSTAFF

Hon. Franklin D Roosevelt
The White House. Washington—D.C.

101e

COPY

David Wagstaff
Tuxedo Park
New York

Dear Mr. Church—

Please don't continue to send me your letters on bear shooting from a yacht in Alaskan or the adjacent islands —All my life I have tried to be a sportsman and to live up to the reputation of my father and uncle—C. DuBois Wagstaff who was a great shot. Your account disgusts me and I sincerely hope that the Aleutian Islands will soon be made a sanctuary.

Yours—

DAVE WAGSTAFF

Campbell Church

EXHIBIT 20

THE WHITE HOUSE
WASHINGTON

January 25, 1939.

MEMORANDUM FOR

THE SECRETARY OF AGRICULTURE

During the *Hoover* Administration an attempt was made by certain large timber interests to get the cutting rights on Admiralty Island, Alaska. It is my recollection that *you and I blocked this* early in the Administration—partly because it looked like a bad bargain and partly because *Admiralty Island* has a wonderful growth of virgin timber and a wonderful growth of very large bears on it.

Would you be good enough to let me know the situation today? Is there any thought of selling timber? If we decide that it should be preserved as a permanent wildlife virgin forest tract, how can we make such a status permanent?

F. D. R.

EXHIBIT 21
Pages 1-2

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
STATE PARK DIVISION
Washington, D. C.

October 22, 1934

MEMORANDUM for The Secretary:

Herewith is submitted for your consideration a map of Glacier Bay National Monument in Alaska showing a proposed extension of boundaries and a summary of the situation with regard to this extension which has been under study by this service for several years.

Prior to the establishment of this Monument in February, 1925, the American Ecological Society emphasized the importance of preserving undisturbed for scientific observation a portion of the Alaskan coastal or post-glacial forest. In the decision on the original boundary lines in 1925 it was necessary to eliminate these coastal lands thereby leaving incomplete the biological factor which is so closely related to the glacial factor that it is probably as important as the glaciers themselves and certainly more subject to destruction.

Since the establishment of the Monument there have been consistent efforts on the part of biologists and conservationists toward a more adequate protection of the Alaska brown bear, as well as the preservation of a more typical stand of Alaskan coastal forest than is included in the present Monument boundaries. A few years ago

there was considerable agitation both for and against the establishment of a National Park on either Chicagof or Admiralty Island for the preservation of the Alaska brown bear. (The National Park Service has consistently avoided active participation in this controversy on the basis that these Islands are a valuable source of pulpwood, and that a national park solely for the purpose of protecting the Alaska brown bear could not be justified.

On September 29, 1932, Mr. Joseph S. Dixon, one of our filed naturalists, investigated the region and submitted a report recommending an addition to Glacier Bay National Monument as a more desirable means of achieving the preservation of the brown bear without sacrificing the commercial resources of Alaska.

This extension as now proposed involves the lands between the present boundaries and the Pacific Ocean, Cross Sound, North Passage and Icy Strait, together with the numerous clear water streams leading into these waters and providing important feeding grounds for the Alaska brown bear.

Although the Forest Service and the commercial interests have strenuously opposed the setting aside of either Chicagof or Admiralty Island as a National Park or Monument, they have expressed willingness to consider instead an addition to Glacier Bay National Monument. Representatives of the Forest Service in Alaska have stated that it would involve but few private holdings and would not interfere with the plans of the Department of Agriculture to develop the paper industry in Alaska. The proposed extension would necessitate the transfer of about 780 square miles of land within the Tongass National Forest.

If this proposed extension meets with your approval a letter will be drafted for your signature to the Secretary

of Agriculture informing him of the situation and asking for his reaction.

A. E. DEMARAY,
Acting Director.

Inclosure 445195

EXHIBIT 22

THE SECRETARY OF THE INTERIOR
WASHINGTON

December 10, 1934

The Honorable,
The Secretary of Agriculture.

My dear Mr. Secretary:

I am enclosing for your consideration a map of Glacier Bay National Monument in Alaska, showing the types of lands involved in the proposed extension of its boundaries.

Since the establishment of this monument, it has appeared that there is need for more adequate protection of the Alaska brown bear than the present limits of this reservation can afford, and for the preservation of a more typical stand of Alaskan coastal forest than is found within the existing monument boundaries.

This proposal extension involves the transfer of about 781 square miles of land now within the Tongass National Forest. Director Cammerer of the National Park Service has advised me that officials of the Forest Service have informally expressed willingness to consider the addition of these lands to the monument area.

If you approve consideration of this extension, I suggest that the Forest Service and the National Park Service complete the details of the proposed addition to this Monument.

Sincerely yours,

Secretary of the Interior.

Enclosure 591753
JLB:fmd
RHW:ejw
cc N.P.S. Office copy

EXHIBIT 23

FREDERICK K. VREELAND
90 West Street
New York

Jan. 13, 1932.

Hon. Horace M. Albright, Director,
National Parks Service
Washington, D.C.

Dear Mr. Albright:

Thank you sincerely for sending me a copy of Secretary Wilbur's new book. The book has not yet arrived but I will look forward with keen interest to receiving it and reading it carefully.

I am glad to know that the reorganized National Parks Association is taking up various projects for new parks, including some of my particular pets. I do hope it will be possible to put these through and get them while the getting is good, but that the National Parks Association may become a real help to you.

I wonder what you think of the plan on which some of us are working to get a new National monument in Alaska—preferably under the jurisdiction of the National Parks Service? While this started with the idea of protecting the brown bears, it looks now as if it has an ever more urgent necessity, if we are to preserve a museum specimen of the great coastal forests of Alaska including the splendid Sitka Spruce.

I am unable to see the necessity at this time of alienating the whole panhandle tract with adjacent islands, including as I understand it substantially all the big timber

of Alaska; of conceding this to a very limited monopoly; of making the concession on a merely nominal consideration; of tying up these lands for generations to come; of allowing this magnificent virgin timber—comprising largely the great Sitka Spruce whose quality is so fine that it has been selected for use in airplane construction—to be ground up into pulp when a second growth and plantation pulpwood is just as good; and to do all this at a time when the pulpwood market is suffering from overproduction.

Surely at least a part of this forest should be preserved. I cannot help wondering whether the tourists who are attracted by these forests will not do more for Alaska than the pulp mills.

Very sincerely yours,

FKV/JW

EXHIBIT 24

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON

January 14, 1932.

Frederick K. Vreeland,
90 West Street,
New York, N.Y.

Dear Mr. Vreeland:

It was nice of you to write me on January 13 about several matters of mutual interest. I would like to talk to you about the Alaska situation some time.

There is not very much that I can say publicly because I cannot get into difficulties with other bureaus in Washington. The Forest Service would never stand for tying up any of the big islands in the Alaska archipelago so there is not much use in talking about a national park to preserve either the timber or the Alaska brown bears.

Governor Parks and Steward Edward White, the writer, evolved a tentative plan last summer that they thought might meet the situation and it seems to me that it has much merit. They would enlarge the Glacier Bay National Monument on the mainland of Alaska, extending it up to the slopes of Mount Fairweather, thence down to the sea, taking in a considerable body of Alaska coastal forest. This would meet the point described in the third paragraph of your letter. I think also that everybody concedes that there are a lot of bears in that part of the coun-

try. I would be glad if you would think this idea over because your judgment will be worth a lot to us. I know of few men who think with such unerring accuracy as you do.

With best regards, I am

Sincerely yours,

HORACE M. ALBRIGHT
Director.

HMA-EG

EXHIBIT 25
Pages 1-3

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
STATE PARK DIVISION
Washington, D. C.

October 22, 1934

Memorandum to: Mr. Conrad L. Wirth

The original draft of this letter together with a letter to the Secretary of Agriculture was ready for signature at about the time the Secretary disapproved the procedure used in the presenting of the Carlsbad Caverns extension project. In view of the resulting uncertainty as to the transfer of National Forest lands, I thought it advisable to hold the Glacier Bay project over until the matter was adjusted. It seems that the accepted procedure now is to give the Secretary a memorandum for approval completely summarizing the situation. If he approves, a letter will be drafted for his signature to the Secretary of Agriculture giving him the details of the situation and suggesting a joint letter signed by both Secretaries transmitting a proposed proclamation to the President.

J. LEE BROWN

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
STATE PARK DIVISION
Washington, D. C.

October 22, 1934

MEMORANDUM for the Secretary:

Herewith is submitted for your consideration a map of Glacier Bay National Monument in Alaska showing a proposed extension of boundaries and a summary of the situation with regard to this extension which has been under study by this service for several years.

Prior to the establishment of this Monument in February, 1925, the American Ecological Society emphasized the importance of preserving undisturbed for scientific observation a portion of the Alaskan coastal or post-glacial forest. In the decision on the original boundary lines in 1925 it was necessary to eliminate these coastal lands thereby leaving incomplete the biological factor which is so closely related to the glacial factor that it is probably as important as the glaciers themselves and certainly more subject to destruction.

Since the establishment of the Monument there have been consistent efforts on the part of biologists and conservationists toward a more adequate protection of the Alaska brown bear, as well as the preservaton of a more typical stand of Alaskan coastal forest than is included in the present Monument boundaries. A few years ago there was considerable agitation both for and against the establishment of a National Park on either Chichagof or Admiralty Island for the preservation of the Alaska brown bear. (The National Park Service has consistently avoided active participation in this controversy on the basis that these Islands are a valuable source of pulpwood, and that

a national park solely for the purpose of protecting the Alaska brown bear could not be justified.

On September 29, 1932, Mr. Joseph S. Dixon, one of our field naturalists, investigated the region and submitted a report recommending an addition to Glacier Bay National Monument as a more desirable means of achieving the preservation of the brown bear without sacrificing the commercial resources of Alaska.

This extension as now proposed involves the lands between the present boundaries and the Pacific Ocean, Cross Sound, North Passage and Icy Strait, together with the numerous clear water streams leading into these waters and providing important feeding grounds for the Alaska brown bear.

Although the Forest Service and the commercial interests have strenuously opposed the setting aside of either Chichagof or Admiralty Island as a National Park or Monument, they have expressed willingness to consider instead an addition to Glacier Bay National Monument. Representatives of the Forest Service in Alaska have stated that it would involve but few private holdings and would not interfere with the plans of the Department of Agriculture to develop the paper industry in Alaska. The proposed extension would necessitate the transfer of about 780 square miles of land within the Tongass National Forest.

If this proposed extension meets with your approval a letter will be drafted for your signature to the Secretary of Agriculture informing him of the situation and asking for his reaction.

E. DEMARAY,
Acting Director.

JLB:klk

Inclosure 445195

EXHIBIT 26

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON

March 2, 1932

Mr. Stewart Edward White,
Little Hill,
Burlingame, Calif.

Dear Mr. White:

I am sure you will be interested in knowing that Mr. B. F. Heinzleman, Asst. District Forester, Alaska District of the U. S. Forest Service, was in my office a few days ago, and we discussed the preservation of the brown bear in southeastern Alaska.

Mr. Heinzleman has spent the last twelve years in Juneau, Alaska, and has become familiar with the southeastern vicinity. He outlined on a map of the Tongass Forest the proposed boundary extension for Glacier Bay National Monument. A copy of that map showing the proposed boundary is inclosed for your information.

You will notice several streams running from this area into the ocean, Cross Sound, Glacier Bay, and Icy Passage. Mr. Heinzleman stated that these streams are salmon spawning streams and are the main feeding ground for the brown bear. He also stated that along the coast just above Lituya Bay there exists the most magnificent stand of sitka spruce timber which is the finest example of coast forests

in Alaska. In this section he stated the Alaskan brown bear concentrated, and he believes that the park or monument would not be complete without this area.

Mr. Heinzleman stated that there was absolutely no mining development of any sort within the proposed boundaries, and the private holdings were very few and limited to the small surveyed area just north of Icy Passage.

The Forest Service, as stated by Mr. Heinzleman, would seriously object to having Admiralty Island or Chicaghof Island in any national park, as well as the area east of the proposed line on the peninsula between Icy Straits and the Lynn Canal because the Department of Agriculture is endeavoring to develop an industry in pulp timber for paper mills, etc. in this section.

Will you please give me your reaction to Mr. Heinzleman's suggestions?

Sincerely yours,

HORACE M. ALBRIGHT
Director

Incl. 129923
HLB-fmd

EXHIBIT 27
Pages 1-3

Address only the Commissioner of the
General Land Office Inc.
UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
WASHINGTON

In Reply Please Refer to
1479171 "A" FSH

January 13, 1933

Cooperation.

The Director,
National Park Service.

My dear Mr. Albright:

I have your letter of December 16, 1932, transmitting map and description of Glacier Bay National Monument, Alaska, with proposed extension.

The greater portion of the area proposed to be added to the monument is in the Tongass National Forest, having been so reserved by proclamation of June 10, 1925, and is therefore under the administration of the Department of Agriculture.

The records of this office show that a small area around Cape Spencer is reserved under Executive order of March 2, 1907, for lighthouse purposes, that a few scattered surveys have been made in the proposed extension for Indian allotments, trade and manufacturing sites, soldiers additional entries and mining claims, and that there are no power projects.

Reports from employees of this office and the Forest Service on file in this office show that the timber within that portion of the proposed extension near the coast is valuable. In this connection reference is had to the report of August 7, 1924, of Governor Parks, than Assistant Supervisor of Surveys and Public Lands, on the area temporarily withdrawn April 1, 1924, for monument classification, which shows the quality and distribution of the timber and is on file in your bureau.

The following is a description of the proposed enlarged monument:

> Beginning at the summit of Mt. Fairweather, on the International Boundary line between Alaska and British Columbia; thence northeasterly along the International Boundary Line, which is also the present boundary of Glacier Bay National Monument, to the summit of Mt. Harris;
>
> thence southeasterly and southerly along the divide between the waters of Glacier Bay and Lynn Canal, which is the present boundary of Glacier Bay National Monument, to a point where said divide is forked by the headwaters of Excursion Inlet;
>
> thence easterly and southeasterly along the divide between the waters of Excursion Inlet and Lynn Canal to a point where said divide meets the subsidiary divide immediately north of the first creek at the head of Excursion Inlet;
>
> thence southwesterly along said subsidiary divide to the east bank of the main stream flowing into Excursion Inlet from the north;
>
> thence southerly along the east bank of said stream to Excursion Inlet;

thence southerly along the center of Excursion Inlet to its junction with the Icy Passage;

thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean;

thence northwesterly along the Pacific coast, including all islands along the coast, to the mouth of Seaotter Creek;

thence easterly along the north bank of Seaotter Creek to its headwaters;

thence in a straight line to the summit of Mt. Fairweather, the place of beginning, excluding the surveyed lands in fractional Tps. 39 and 40 S., Rs. 57 and 58 E., and T. 40 S., R. 59 E., Copper River meridian, containing approximately 3,278 square miles.

The map transmitted is herewith returned.

Very respectfully,

Commissioner.

1012 mvd

EXHIBIT 28
Pages 1-2

July 20, 1934.

The Commissioner
General Land Office,
Washington, D. C.

My dear Mr. Commissioner:

By letter to you of July 5, I asked for the status of certain lands adjacent to the Glacier Bay National Monument in Alaska, which we are considering for a proposed extension of the Monument.

The boundaries described in that letter include all lands on the east side of the present Monument which might possibly be included within the proposed extension. Since the letter was sent, a decision has been made in favor of a more restricted extension. We would like to receive from your office an estimate of area, expressed in acres or in square miles, within the boundaries described as follows:

Beginning at the summit of Mt. Harris, on the International Boundary line between Alaska and British Columbia, thence northerly along the International Boundary line to a point where the said line crosses the Tairku River, at the foot of Tairku Glacier;

Thence east-southeasterly down the north bank of the Tairku River to a point opposite the mountain pass formed by the drainage into the headwaters of the Takhin River, and directly north of the foot of Takhin Glacier, which point is located at about 56° 10′ north and 136° 8′ 30″ west of Greenwich;

Thence southeasterly through the center of said pass to a point at the extreme upper end of the Takhin River watershed, and at the foot of Takhin Glacier, which point is located at about 59° 13″ north and 136° 7′ 30″ west of Greenwich;

Thence east-southeasterly down the north bank of the Takhin River to its junction with the Chilcat River; thence southeasterly and southerly down the main channel of the Chilcat River through Chilcat Inlet, through the channel west of Sullivan Island and down the west side of Lynn Canal, including all islands along the shore to the mouth of the Endicott River;

Thence west-southwesterly and southerly along the divide between the waters of the Lynn Canal and the Endicott River to a point where said divide joins the divide between the waters of Lynn Canal and Excursion Inlet, at the summit of a peak having an elevation of 4,000 feet, which point is located at about 58° 30′ north, and 135° 29′ west of Greenwich;

Thence northwesterly and westerly along the divide between the waters of Excursion Inlet and Lynn Canal to the point where the main divide between the waters of Glacier Bay and Lynn Canal is forked by the headwaters of Excursion Inlet, which point is also located on the present boundary line of Glacier Bay National Monument, at about 58° 44′ north and 135° 41′ west of Greenwich;

Thence northerly and northwesterly along the divide between the waters of Glacier Bay and Lynn Canal which is also the present boundary of Glacier Bay National Monument, to the point of beginning at the

summit of Mt. Harris, which is on the International Boundary line.

If it is possible, we would like to receive this information along with the land status of the area described in the previous letter.

Sincerely yours,

A. E. DEMARAY.
Acting Director.

JLB-fmd

EXHIBIT 29
Pages 1-4

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON

August 10, 1934.

Memorandum to: Mr. Moskey.

Attention: Mr. Brooks.

Attached is a draft of a Proclamation for the establishment of the proposed extension to Glacier Bay National Monument in Alaska, which was drawn up some time ago.

I have been unable to ascertain whether this was done in your office or not. Perhaps you will want to check it before we send it through.

CONRAD L. WIRTH
Assistant Director.

By J. LEE BROWN

Enclosure: 580337

GLACIER BAY NATIONAL MONUMENT—ALASKA

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA A PROCLAMATION

WHEREAS it appears that the public interest would be promoted by adding to the Glacier Bay National Monument, Alaska, certain adjoining lands for the purpose of including within said monument additional lands on which there are located features of historical and scientific interest and for the protection of many forms of animal and plant life;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, by virtue of the power in me vested by section two of the act of Congress entitled "An act for the preservation of American antiquities," approved June 8, 1906 (34 Stat. 225), do proclaim that such additional lands in Alaska be, and the same are hereby, added to and made a part of the Glacier Bay National Monument, and that the boundaries of the said monument as hereby changed are described as follows:

> Beginning at the summit of Mt. Fairweather, on the International Boundary line between Alaska and British Columbia; thence northeasterly along the International Boundary line, which is also the present boundary of Glaciar Bay National Monument, to the summit of Mt. Harris;
>
> thence southeasterly and southerly along the divide between the waters of Glacier Bay and Lynn Canal, which is the present boundary of Glacier Bay Na-

tional Monument, to a point where said divide is forked by the headwaters of Excursion Inlet;

thence easterly and southeasterly along the divide between the waters of Excursion Inlet and Lynn Canal to a point where said divide meets the subsidiary divide immediately north of the first creek at the head of Excursion Inlet;

thence southwesterly along said subsidiary divide to the east bank of the main stream flowing into Excursion Inlet from the north;

thence southerly along the east bank of said stream to Excursion Inlet;

thence southerly along the center of Excursion Inlet to its junction with the Icy Passage; thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean;

thence northwesterly along the Pacific coast, including all islands along the coast, to the mouth of Seaotter Creek;

thence easterly along the north bank of Seaotter Creek to its headwaters;

thence in a straight line to the summit of Mt. Fairweather, the place of beginning, excluding the surveyed lands in fractional Tps. 39 and 40 S., Rs. 57 and 58 E., and T. 40 S., R. 59 E., Copper River meridian, containing approximately 3,278 square miles.

Warning is hereby expressly given to all unauthorized persons not to apppropriate, injure, destroy, or remove

any feature of this monument and not to locate or settle upon any of the lands thereof.

The Director of the National Park Service, under the direction of the Secretary of the Interior, shall have the supervision, management, and control of this monument, as provided in the act of Congress entitled "An act to establish a National Park Service, and for other purposes," approved August 25, 1916 (38 Stat. 535), and acts additional thereto or amendatory thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this day of April in the year of our Lord nineteen hundred and thirty-four and of the Independence of the United States of America the one hundred and fifty-eighth.

By the President:

Secretary of State.

EXHIBIT 30
Pages 1-2

UNITED STATES
DEPARTMENT OF THE INTERIOR

NATIONAL PARK SERVICE
WASHINGTON

Address Only
The Director National Park Service

October 17, 1938.

VIA AIR MAIL

Memorandum for Mr. Joseph S. Dixon:

There are enclosed a copy of a map and description of the area we are recommending for establishment as Glacier Bay National Park. The proposed park includes the present Glacier Bay National Monument and certain extensions on the southern and western sides.

Please advise by return airmail or radio whether the area shown on the attached map is the boundary recommended in your report of September 29, 1932.

Acting Supervisor of
Recreation and Land Planning

Enclosures 1889776

cc: R-IV
cc: Mr. Cahalane
cc: Mr. Little

WEL-fmd

DESCRIPTION OF PROPOSED GLACIER BAY NATIONAL PARK.

Beginning at the summit of Mt. Fairweather, on the International Boundary line between Alaska and British Columbia; thence northeasterly along the International Boundary line, which is also the present boundary of Glacier Bay National Monument, to the summit of Mt. Harris;

thence southeasterly and southerly along the divide between the waters of Glacier Bay and Lynn Canal, which is the present boundary of Glacier Bay National Monument, to a point where said divide is forked by the headwaters of Excursion Inlet;

thence easterly and southeasterly along the divide between the waters of Excursion Inlet and Lynn Canal to a point where said divide meets the subsidiary divide immediately north of the first creek at the head of Excursion Inlet;

thence southwesterly along said subsidiary divide to the east bank of the main stream flowing into Excursion Inlet from the north;

thence southerly along the east bank of said stream to Excursion Inlet;

thence southerly along the center of Excursion Inlet to its junction with the Icy Passage; thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean;

thence northwesterly along the Pacific coast, including all islands along the coast, to the mouth of Seaotter Creek;

thence easterly along the north bank of Seaotter Creek to its headwaters;

thence in a straight line to the summit of Mt. Fairweather, the place of beginning, excluding the surveyed lands in fractional Tps. 39 and 40 S., Rs. 57 and 58 E., and T. 40 S., R. 59 E., Copper River meridian, containing approximately 3,278 square miles.

EXHIBIT 31
Pages 1-2

ADDRESS ONLY THE COMMISSIONER OF THE
GENERAL LAND OFFICE

UNITED STATES
DEPARTMENT OF THE INTERIOR

GENERAL LAND OFFICE
WASHINGTON

November 30, 1938

In Reply Please Refer to
1479171 "E"

Description.

The Director,
National Park Service.

My dear Mr. Cammerer:

Reference is made to your memorandum of November 18 requesting a description of the area now proposed for addition to Glacier Bay National Monument as shown upon a map of the locality furnished us informally.

The following is a description of the extended Glacier Bay National Monument following the boundary line indicated on the map above referred to, which, except for the new area now proposed between Lynn Canal and Icy Strait, is identical with that furnished you in office letter dated January 13, 1933:

> Beginning at the summit of Mt. Fairweather, on the International Boundary line between Alaska and British Columbia; thence northeasterly along the International Boundary line, which is also the present boundary of Glacier Bay National Monument, to the summit of Mt. Harris;

thence southeasterly and southerly along the divide between the waters of Glacier Bay and Lynn Canal, which is the present boundary of Glacier Bay National Monument, to a point where said divide is forked by the headwaters of Excursion Inlet;

thence easterly and southeasterly along the divide between the waters of Excursion Inlet and Lynn Canal to a point in approximate latitude 58°27'N., longitude 135°18'W., where said divide meets a subsidiary divide between streams flowing into Excursion Inlet;

thence westerly and northwesterly along said subsidiary divide to Excursion Inlet;

thence southerly along the center of Excursion Inlet to its junction with the Icy Passage;

thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean;

thence northwesterly along the Pacific coast, including all islands along the coast, to the mouth of Seaotter Creek;

thence easterly along the north bank of Seaotter Creek to its headwaters;

thence in a straight line to the summit of Mt. Fairweather, the place of beginning, excluding the surveyed lands in fractional Tps. 39 and 40 S., Rs. 57 and 58 E., and T. 40 S., R. 59 E., Copper River meridian, containing approximately 3,322 square miles.

The map transmitted is herewith returned.

Very truly yours,

Acting Assistant Commissioner.

EXHIBIT 32

UNITED STATES
DEPARTMENT OF THE INTERIOR

NATIONAL PARK SERVICE
WASHINGTON

Address Only
The Director National Park Service

September 15, 1938.

Memorandum for the solicitor:

The secretary has indicated that the following proposed legislation should be sought during the next session of Congress:

A bill to establish the Glacier Bay National Park, Alaska, and for other purposes.

This legislation would give the present national monument the status of a national park and would include additional lands within the park. An enlargement of the present monument could be effected by executive proclamation.

A bill to authorize the Alaska Railroad to construct, maintain, and operate public facilities in the Mount McKinley National Park, Alaska, and for other purposes.

This bill should authorize the Alaska Railroad to construct, maintain, and operate public lodges, furnish the necessary transportation service in the park, and reimburse the existing operator for taking over public facilities heretofore established in the park.

Please supplement our memorandum of August 21, listing the legislation this Service recommends sponsoring during the next session of the Congress, with the above-mentioned proposed legislation.

Acting Director.

cc - Secretary's Office
Mr. Gable
Mr. Wirth
Mr. McGilliam

EXHIBIT 33

UNITED STATES
DEPARTMENT OF THE INTERIOR

NATIONAL PARK SERVICE
WASHINGTON

Address Only
The Director National Park Service

December 27, 1938.

Memorandum for the Secretary:

The report of Mr. Coffman and Mr. Dixon on the proposed Glacier Bay National Park is attached for your information.

There appears to be no feasible solution of the mining problem in connection with the proposal to submit legislation for the establishment of the area in question as a national park because special legislation has been enacted recently, at the instance of the President, subjecting the Glacier Bay National Monument to prospecting and mining under the Act of June 22, 1936 (49 Stat. 1817). It is believed that legislation for the establishment of the area as a National Park would have to include a provision to the effect that the aforesaid mining act shall remain in effect with regard to the park.

It is believed also that the proposed stablishment of the area as a National Park, subject to prospecting and mining, will be vigorously opposed by the various conservation organizations and others interested in keeping the national park system free from such "non-conforming" uses.

The area desired for addition to the present national monument might be added thereto by Presidential Proclamation, and the Department and this Service thereby avoid criticism for a proposal to establish a national park subject to an unrestricted mining provision. Accordingly, it is recommended that you authorize the Service to prepare a Presidential Proclamation enlarging Glacier Bay National Monument.

Acting Director.

Enclosure 1757579

Approved: _____

Secretary of the Interior.

EXHIBIT 34

UNITED STATES
DEPARTMENT OF THE INTERIOR

NATIONAL PARK SERVICE
WASHINGTON

Address Only
The Director National Park Service

December 21, 1938.

Dr. W. S. Cooper,
Department of Botany,
University of Minnesota,
Minneapolis, Minnesota.

Dear Doctor Cooper:

Your letter of December 13, with regard to the proposed boundaries for the Glacier Bay area, is received.

The report to which Mr. Dixon refers has not yet been completed but should be ready for submission and consideration in a very short time. The boundaries which are recommended in the report are similar to those which were discussed with you at the time of your visit to Washington in May of last year. There is some question as yet whether the surveyed lands adjacent to Point Gustavus should be included in the proposed boundaries, and also whether the boundaries should extend east to Exursion Inlet and to a portion of the divide between Excursion Inlet and Lynn Canal. Otherwise the boundaries proposed will extend the Glacier Bay National Monument to the shore line both to the south and west, so as to form a natural biotic unit and provide material protection for the Alaska brown and grizzly bears.

Suggestion has been made to request legislation establishing this enlarged area as the Glacier Bay National Park, but as long as the mining provision stands, this would probably be opposed by conservation organizations. It could be extended by proclamation as the National Monument.

We will welcome any suggestions you may wish to offer in this regard.

Sincerely yours,

A. E. DEMARAY.
Acting Director.

CC: Mr. Joseph S. Dixon
Field Naturalist, NPS
San Francisco, California.

JC/ilb

APPENDIX OF STATUTORY PROVISIONS INVOLVED

Antiquities Act of 1906, 16 U.S.C. §§ 431-433

16 U.S.C. § 431. National monuments; reservation of lands; relinquishment of private claims

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

16 U.S.C. § 432. Permits to examine ruins, excavations, and gathering of objects; regulations

Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and Army to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of

reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums. The Secretaries of the departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this section and sections 431 and 433 of this title.

16 U.S.C. § 433. American antiquities

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

* * * *

Alaska Statehood Act, July 7, 1958, 72 Stat. 339, Pub. L. No. 85-508, 48 U.S.C. note prec. § 21

AN ACT To provide for the admission of the State of Alaska into the Union

* * * *

Section 6(m):

The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315

43 U.S.C. § 1301. Definitions

When used in this subchapter and subchapter II of this chapter—(a) The term "lands beneath navigable waters" means—(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, [FN1] and (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this sub-

chapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: Provided, however, That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams

was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

43 U.S.C. § 1311. Rights of the States

(a) Confirmation and Establishment of Title and Ownership of Lands and Resources; Management, Administration, Leasing, Development, and Use

It is hereby determined and declared to be in the public interest that

(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and

(2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof,

recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and Relinquishment of Title and Claims of United States; Payment to States of Moneys Paid under Leases

(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, ex-

cept as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;

(2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and

3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

* * * *

43 U.S.C. § 13.13. Exceptions from Confirmation and Establishment of States' Title, Power and Rights

There is excepted from the operation of section 1311 of this title—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds

under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right; (b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and (c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

(17)

No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

GARY B. RANDALL
MICHAEL W. REED
BRUCE M. LANDON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The State of Alaska invokes this Court's original jurisdiction to initiate an action against the United States under the Quiet Title Act of 1972, 28 U.S.C. 2409a. That action would determine the following three issues:

1. Whether, as alleged in Count I of the Complaint to Quiet Title, the State of Alaska has title to marine submerged lands within the Alexander Archipelago that are more than three nautical miles from any point on the coast line of the mainland or the islands of the Archipelago, but that are either landward or within three nautical miles seaward of a series of closing lines described in the 1903 Alaska Boundary Tribunal Arbitration proceedings as marking the seaward limits of the inland waters of the Archipelago.

2. Whether, as alleged in Count II of the Complaint to Quiet Title, the State of Alaska has title to marine submerged lands within the exterior boundaries of the Tongass National Forest that are within three nautical miles of any point on the coast line of the mainland or the islands therein and that the United States claims as within the jurisdiction of the United States Forest Service.

3. Whether, as alleged in Count III of the Complaint to Quiet Title, the State of Alaska has title to marine submerged lands within the exterior boundaries of the Glacier Bay National Park and Preserve that are within three nautical miles of any point on the coast line of the mainland or the islands therein and that the United States claims as within the jurisdiction of the National Park Service.

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In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES

JURISDICTION

The jurisdiction of this Court is invoked under Article III, § 2, Cl. 2, of the United States Constitution and 28 U.S.C. 1251(b)(2).[1]

[1] As we explain in the Statement, the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a, provides a limited waiver of the United States' sovereign immunity in cases, such as this one, in which a plaintiff (including a State) seeks to quiet title to land in which the United States claims an interest. The QTA's jurisdictional provision, 28 U.S.C. 1346(f), provides:

> The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

Although that text would appear to preclude Alaska from bringing this action in this Court, the Court has construed 28 U.S.C. 1346(f) to impose no bar to its exercise of jurisdiction in cases that would

STATEMENT

The State of Alaska seeks leave to commence an original action against the United States under the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a. Alaska alleges that it owns marine submerged lands bordering its southeastern uplands, which consist of a narrow strip of mountainous mainland comprising the Boundary Range of the Coast Mountains and a series of islands known as the Alexander Archipelago. The submerged lands in question lie within the current exterior boundaries of the Tongass National Forest and the Glacier Bay National Park and Preserve. Alaska requests a determination from this Court that the United States has not retained title to those lands.

To place this matter in context, we begin by describing the QTA, which provides the waiver of sovereign immunity necessary for Alaska to maintain this suit. We then briefly describe the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which provide the basic legal principles on which Alaska bases its complaint. Finally, we summarize Alaska's three specific claims for relief.

A. The Quiet Title Act Of 1972

"The States of the Union, like all other entities, are barred by federal sovereign immunity from suing the United States in the absence of an express waiver of this immunity by Congress." *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983). Congress enacted the QTA to provide a limited waiver of that immunity in cases in which States or private parties seek to quiet title to real property in which the United States claims an

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otherwise fall within the Court's constitutional grant of original jurisdiction. See *California* v. *Arizona*, 440 U.S. 59 (1979).

interest. See *id.* at 275-276, 280-286. The QTA, which contains a number of carefully crafted conditions and limitations, provides "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property." *Id.* at 286. Except to the extent that Congress has provided otherwise, those limitations apply equally to suits brought by States and to suits brought by private parties. *Id.* at 287-290.

The QTA places a variety of limitations on suits seeking to quiet title against the United States. For example, the QTA does not waive the United States' immunity to suit respecting trust or restricted Indian lands. 28 U.S.C. 2409a(a). In addition, the United States may not be disturbed in its possession until 60 days after a final adverse judgment, and it has the option of retaining possession or control by paying just compensation. 28 U.S.C. 2409a(b). The complaining party may not obtain a preliminary injunction running against the United States, 28 U.S.C. 2409a(c), and it must set out in its complaint "with particularity" its claim and the United States' competing claim to the real property, 28 U.S.C. 2409a(d). The United States may disclaim its interest at any time prior to the actual commencement of trial and, in that circumstance, upon the court's confirmation of the disclaimer, the court's jurisdiction shall cease. 28 U.S.C. 2409a(e). Furthermore, the QTA specifies that the action shall be tried by the court without a jury. 28 U.S.C. 2409a(f).

The QTA also contains specific limitations on the timing of such suits. The Act originally provided that any action "shall be barred unless it is commenced within twelve years of the date upon which it accrued." 86 Stat. 1176 (28 U.S.C. 2409a(f)). See *Block*, 461 U.S. at 275 n.1. This Court ruled in *Block* that the 12-year statute of limitations applied to States and private

parties alike. *Id.* at 287-290. Congress thereafter amended the QTA to provide special rules for suits by States. See Act of Nov. 4, 1986, Pub. L. No. 99-598, 100 Stat. 3351. Under the revised and newly added provisions, a State's action is not subject to the general 12-year bar. 28 U.S.C. 2409a(g). Nevertheless, the QTA does place time-based restrictions on a State's right to bring a suit involving lands used for national defense purposes, 28 U.S.C. 2409a(h), and lands on which the United States has made substantial improvements or investments or conducted other substantial activities, 28 U.S.C. 2409(i) and (j).[2]

In addition, the QTA places special notice requirements on the State. Subsection (m) provides:

> Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's

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[2] Specifically, subsection (h) provides that a State may not bring a quiet title action respecting lands that are in use for national defense purposes unless the suit is brought within 12 years after the State knew or should have known of the claims of the United States; if the State fails to sue within that time period, it may dispute title only after the land ceases to be used for national defense purposes. 28 U.S.C. 2409a(h). Subsection (i) bars a State from bringing an action respecting uplands that have been subject to substantial improvements, investments, or activities unless the State brings suit within 12 years of receiving notice of the claims of the United States. 28 U.S.C. 2409a(i). Subsection (j) provides that, if a State brings a quiet title action respecting submerged lands more than 12 years after receiving notice of the United States' claim to the lands, and the State is adjudged to own the lands in question, the State shall take title subject to any existing lease, easement, or right-of-way. 28 U.S.C. 2409a(j). See also 28 U.S.C. 2409a(k) (describing "notice"); 28 U.S.C. 2409a(l) (defining "submerged lands").

> intention to file suit, the basis therefor, and a description of the lands included in the suit.

28 U.S.C. 2409a(m). The final subsection of the QTA, which is applicable to both States and private parties, makes clear that "[n]othing in this section shall be construed to permit suits against the United States based upon adverse possession." 28 U.S.C. 2409a(n).

B. The Equal Footing Doctrine And The Submerged Lands Act

Alaska has moved for leave to file a QTA complaint against the United States that seeks to quiet title to marine submerged lands based on three distinct theories. Those theories, set out in the three separate counts of the complaint, rest on legal principles derived from the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*

1. The Equal Footing Doctrine

The equal footing doctrine, as applicable to submerged lands, rests on principles derived from English common law. See *Utah Division of State Lands* v. *United States*, 482 U.S. 193, 195 (1987). The English courts recognized that the English Crown held sovereign title to all lands underlying navigable waters. *Id.* at 195-196. When the 13 Colonies declared their independence, they claimed title to lands under navigable waters within their boundaries as the sovereign successors to the Crown. *Id.* at 196. Because subsequently admitted States enter the Union on an "equal footing," they likewise acquire title to submerged lands within their boundaries. *Ibid.* See, *e.g.*, *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). The equal footing doctrine is subject, however, to significant limitations. Two such limitations are particularly relevant here.

First, this Court has recognized that the 13 Colonies had no sovereign entitlement to submerged lands that are seaward of the coast line, which is determined by the low-water mark along the coast and the closing lines of bays or river mouths. See *United States* v. *Alaska (Beaufort Sea)*, 521 U.S. 1, 5 (1997). The equal footing doctrine strictly applies, correspondingly, only to submerged lands that are landward of the coast line, *viz.*, tidelands and lands beneath inland navigable waters. Under settled principles, "the United States has paramount sovereign rights in submerged lands seaward of the low-water line." *Ibid.* See *United States* v. *California* (*California I*), 332 U.S. 19, 33-36 (1947).

Second, this Court has recognized that the United States has constitutional power under the Property Clause, Art. IV, § 3, Cl. 2, to defeat a future State's entitlement under the equal footing doctrine to submerged lands. *Alaska (Beaufort Sea)*, 521 U.S. at 33-34. The United States may do so, prior to statehood, by either conveying those lands to private parties, see *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894), or reserving those lands for federal governmental use, *Alaska (Beaufort Sea)*, 521 U.S. at 33-34. The Court's equal footing decisions indicate, however, that "'[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *Id.* at 34 (quoting *Montana* v. *United States*, 450 U.S. 544, 552 (1981)). The United States accordingly bears the burden of establishing its title to such lands.

2. The Submerged Lands Act

Congress enacted the Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq.*, as an exercise of its sovereign

paramount powers. See, *e.g.*, *United States* v. *Maine*, 420 U.S. 515, 524-525 (1975). The Act recognizes the States' historic equal footing claims to inland submerged lands, but also grants coastal States title to a specified measure of submerged lands seaward of the coast line. See SLA §§ 3-6, 43 U.S.C. 1311-1314. Specifically, Section 3(a) of the Submerged Lands Act "confirm[s]" and "establish[s]" the States' title to and interest in "lands beneath navigable waters within the boundaries of the respective States." 43 U.S.C. 1311(a). As this Court explained in *Alaska (Beaufort Sea)*, *supra*:

> The Act defines "lands beneath navigable waters" to include both lands that would ordinarily pass to a State under the equal footing doctrine and lands over which the United States has paramount sovereign rights, beneath a 3-mile belt of the territorial sea [SLA § 2(a), 43 U.S.C. 1301(a)]. The Act essentially confirms States' equal footing rights to tidelands and submerged lands beneath inland navigable waters; it also establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States.

521 U.S. at 5-6.

The Submerged Lands Act's grant of submerged lands to the States is subject to important exceptions. Of particular interest here, Section 5(a) of the Act states in pertinent part:

> There is excepted from the operation of [Section 3(a)]—
>
> (a) * * * all lands expressly retained by or ceded to the United States when the State

> entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea).

43 U.S.C. 1313(a). That provision prevents the Submerged Lands Act from divesting the United States of submerged lands that the United States reserved for federal use at the time of statehood. See S. Rep. No. 133, 83d Cong., 1st Sess. 16, 20 (1953) (describing the language as "self-explanatory"); 99 Cong. Rec. 2619 (1953) ("The purpose of the language is to reserve to the United States those facilities and those areas which are used by the Government in its governmental capacity for one or more of it governmental purposes.") (remarks of Sen. Cordon).

This Court ruled in *Alaska (Beaufort Sea)* that the question whether the United States has retained submerged lands that would otherwise pass to the State involves essentially the same inquiry under Section 5(a) of the Submerged Lands Act and under the equal footing doctrine. 521 U.S. at 33-36. The Court will not infer an intent to defeat a future State's title to submerged lands unless the intention was "definitely declared or otherwise made very plain." *Id.* at 34, 35-36 (quoting *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926)). Nevertheless, the question whether the United States has retained submerged lands "is ultimately a matter of federal intent." 521 U.S. at 36. The Court accordingly examines whether the United States intended to include the submerged lands within a federal reservation and whether the United States intended to retain that reservation of submerged lands at statehood. *Ibid.*

C. Alaska's Claims For Relief

Alaska's proposed complaint asserts ownership of submerged lands based on three distinct theories that apply to different geographic regions. Those theories are embodied in the three separate counts of the complaint.

1. "Count I: Historic Waters of the Alexander Archipelago"

Count I of Alaska's complaint (paras. 4-22) objects to the way in which the United States has measured the Submerged Lands Act's grant of the three-mile belt of lands beneath the territorial sea in the area of the Alexander Archipelago. The Submerged Lands Act specifies that the three-mile grant is measured from the "coast line," which the Act defines as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." SLA § 2(c), 43 U.S.C. 1301(c). This Court has ruled that the Convention on the Territorial Sea and the Contiguous Zone (the Convention), Apr. 29, 1958, [1964] 15 U.S.T. 1606, supplies the principles for determining, among other things, the extent of inland waters under the Submerged Lands Act. See *Alaska (Beaufort Sea)*, 521 U.S. at 8.

In this case, as in *Alaska (Beaufort Sea)*, the United States has applied the Convention's "normal baseline" principles, which employ the "arcs-of-circles" method for determining the extent of the territorial sea. See 521 U.S. at 9. Under that method, which the United States has uniformly applied throughout the Nation for both international and domestic purposes, a coast line that is deeply indented or that includes closely spaced

barrier islands may generate small areas or "enclaves" that are more than three miles from shore, but that are partially or completely surrounded by the 3-mile belt. See *ibid.* The Alexander Archipelago, like the Steffanson Sound at issue in *Alaska (Beaufort Sea)* (see *ibid.*), exhibits that characteristic. See Alaska Compl. Exh. 1. Alaska contends that it is entitled to the submerged lands beneath those enclaves as part of its Submerged Lands Act grant. See Compl. paras. 4-22.

Alaska rests its claim on the international principle of "historic bays." The Convention recognizes that a foreign nation may base a claim of inland waters on the theory that the waters constitute a historic bay, Art. 7(6), 15 U.S.T. 1609, and this Court has recognized that a State may claim title to submerged lands on that basis. See *United States* v. *Louisiana (Alabama & Mississippi Boundary Case)*, 470 U.S. 93 (1985) (holding that Mississippi Sound is a historic bay); but see *United States* v. *Alaska (Cook Inlet)*, 422 U.S. 184 (1975) (rejecting the claim that Cook Inlet is a historic bay); *United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 17-32 (1969) (rejecting the claim that the United States' creation of an "Inland Water Line" for purposes of regulating navigation created historic inland waters); *United States* v. *California (California II)*, 381 U.S. 139, 173-175 (1965) (rejecting claims that Santa Monica Bay, San Pedro Bay, and other disputed waters are historic bays).

To succeed on its claim, Alaska must demonstrate, among other things, that the United States has "effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States." *Alabama & Mississippi Boundary Case*, 470 U.S. at 102 (quoting *Juridical Regime of Historic*

Waters, Including Historic Bays 56, U.N. Doc. A/CN.4/143 (1962)); see also *Alaska (Cook Inlet)*, 422 U.S. at 189, 197 ("the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation"). The State must also overcome the effect of the United States' longstanding international disclaimer of the Alexander Archipelago as forming a historic bay. Cf. *Alabama & Mississippi Boundary Case*, 470 U.S. at 111-112; *California II*, 381 U.S. at 175 (giving decisive weight to a disclaimer of the United States in a case involving "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters").

2. "Count II: The Tongass National Forest"

Count II of Alaska's complaint (paras. 23-28) recognizes that, prior to Alaska's admission to the Union, the United States withdrew substantial acreage in the southeastern region of the Territory of Alaska to create the Tongass National Forest. See Proclamation of Sept. 10, 1907, 35 Stat. 2152; Exec. Order No. 908 (July 2, 1908); Proclamation of Feb. 16, 1909, 35 Stat. 2226; Proclamation of June 10, 1925, 44 Stat. 2578. The Tongass National Forest is distinct from many other forest reserves because the forest can be reached, and its timber removed, only through marine facilities. The presidential proclamations and executive order creating and enlarging the Tongass National Forest correspondingly established its exterior boundary seaward of the marine coast line. See Compl. Exh. 2 (map of Tongass National Forest). Upon Alaska's admission to the Union, the United States expressly retained its title to lands within national forests, subject to Alaska's right to select 400,000 acres of those lands for the State's use. See Act of July 7, 1958 (Alaska Statehood Act), Pub. L.

No. 85-508, §§ 5, 6(a), 72 Stat. 339, 340. The United States accordingly claims rights and interests in the marine submerged lands within the Tongass National Forest.

Alaska, through Count II of its complaint, contests the United States' claim and asserts that the federal "withdrawal and reservation of lands within the boundaries [of the Tongass National Forest] did not reserve or defeat Alaska's title to those submerged lands." Compl. para 25. To succeed on Count II, Alaska must overcome the United States' claim, under the legal principles that this Court identified in *Alaska (Beaufort Sea)*, that the United States intended to reserve the submerged lands in question and to retain them at statehood. See *Alaska (Beaufort Sea)*, 521 U.S. at 32-61.[3]

3. "Count III: Glacier Bay National Monument"

Count III of Alaska's complaint (paras. 29-44) addresses the United States' pre-statehood withdrawal of public lands, and redesignation of a portion of the Tongass National Forest, to create Glacier Bay National Monument. See Proclamation No. 1733, 43 Stat. 1988 (1925) (creating the original Monument); Proclamation No. 2330, 3 C.F.R. 83 (1939) (enlarging the Monument). The United States created the Monument to protect the distinctive features of Glacier Bay, including tidewater glaciers and wildlife species that rely on marine resources and tideland habitat. As in the case of the Tongass National Forest, the

[3] The enclaves at issue in Count I of Alaska's complaint are within the exterior boundaries of the Tongass National Forest. Hence, to establish its claim of title to those enclaves, Alaska must prevail on both Counts I and II of the complaint.

presidential proclamations creating and enlarging Glacier Bay National Monument established its exterior boundary seaward of the marine coast line. See Compl. Exh. 3 (map of Glacier Bay National Monument). Upon Alaska's admission to the Union, the United States expressly retained its title to those public lands, expressly excepting from State ownership "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife [and] facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife," Alaska Statehood Act § 6(e), 72 Stat. 340. See *Alaska (Beaufort Sea)*, 521 U.S. at 47. That description embraces what was then Glacier Bay National Monument and what is now part of Glacier Bay National Park and Preserve. See Alaska National Interest Lands Conservation Act (ANILCA), §§ 202(1), 203, 16 U.S.C. 410hh-1, 410hh-2.

Alaska, through Count III of its complaint, contests the United States' claim and asserts that Alaska "took title to all lands underlying marine waters within the boundaries of Glacier Bay National Monument at statehood, pursuant to the equal footing doctrine and the Submerged Lands Act." Compl. para. 42. To succeed on Count III, Alaska must overcome the United States' claim, under the legal principles that this Court identified in *Alaska (Beaufort Sea)*, that the United States intended to reserve the submerged lands in question and to retain them at statehood. See *Alaska (Beaufort Sea)*, 521 U.S. at 32-61.

ARGUMENT

ALASKA'S MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT SHOULD BE GRANTED

Subject to the qualifications described below, the United States submits that Alaska should be granted leave to file its complaint. Alaska's claim that the Alexander Archipelago is a "historic bay" presents a boundary dispute of the type that traditionally has been decided through this Court's exercise of original jurisdiction. Alaska's claims of title to submerged lands within the Tongass National Forest and the Glacier Bay National Park and Preserve raise issues that are sufficiently related to the Alaska's "historic bay" claim to warrant resolution in a single original action to quiet title. Alaska's claims for relief, as circumscribed by the complaint and the understandings of the parties, satisfy the threshold jurisdictional and prudential criteria for an original action and present appropriate matters for referral to a special master.

A. Alaska's Complaint Raises The Types Of Issues Over Which This Court Traditionally Has Exercised Its Original Jurisdiction

Article III grants the Court original jurisdiction over cases "in which a State shall be Party." U.S. Const. Art. III, § 2, Cl. 2. Congress has specified, however that this Court's original jurisdiction over "controversies between the United States and a State" is not exclusive. 28 U.S.C. 1251(b)(2). See *Case* v. *Bowles*, 327 U.S. 92, 97 (1946). Congress has granted the district courts authority, through the jurisdictional provisions governing the QTA, to decide disputes between the United States and a State over title to real property.

See 28 U.S.C. 1346(f); note 1, *supra*. Nevertheless, disputes between the United States and a State over the location of a maritime federal-state boundary have traditionally been filed as original actions in this Court. See *California ex rel. State Lands Comm'n* v. *United States*, 457 U.S. 273, 277 n.6 (1982).

This Court has expressed a preference for resolving maritime federal-state boundary disputes through its original jurisdiction. As Alaska notes (Br. in Support of Motion 7), the United States brought an action in federal district court during the 1960s to resolve Alaska's claim of title to submerged lands within Cook Inlet. See *Alaska (Cook Inlet)*, 422 U.S. at 186. When the issue reached this Court on writ of certiorari, the Court suggested that an original action would have been the more appropriate course. *Id.* at 186 n.2. See also *United States* v. *Louisiana*, 363 U.S. 1, 85 n.143 (1960) (denying Louisiana's motion to transfer an original action involving a federal-state boundary dispute to a United States district court in Louisiana). The issue that Alaska raises in Count I of its complaint—whether the Alexander Archipelago is a "historic bay" under the Convention—presents the same type of issue that was raised in *Alaska (Cook Inlet)* and that this Court indicated could be raised in original action. Compare 422 U.S. at 187-189, with Alaska Compl. paras. 4-22.[4]

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[4] The Court's preference for resolving federal-state boundary disputes through original actions rests, in substantial part, on historical practice. In 1945, the United States invoked this Court's original jurisdiction to resolve the nationally important issue of whether the United States had paramount rights and interests in marine submerged lands below the low-water mark. See *California I*, *supra*. Following the Court's decision in *California I*, Congress enacted the Submerged Lands Act and the Outer

This Court has also recognized that, when a marine federal-state boundary is properly in controversy, the parties may invoke the Court's original jurisdiction to resolve disputes over the scope of federal reservations that embrace related submerged lands. For example, in *Alaska (Beaufort Sea)*, the United States brought an original action to determine the location of the federal-state boundary in the oil-rich Beaufort Sea. See 521

Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, which generated new questions over the location of the federal-state boundary. The United States and the States continued the practice of invoking the Court's original jurisdiction to resolve those questions, which typically arose out of controversies over offshore mineral leasing rights. See, *e.g.*, *United States* v. *Louisiana*, 363 U.S. 1 (1959); *California II*, *supra*; *Louisiana Boundary Case*, 394 U.S. 11 (1969); *United States* v. *Maine*, 420 U.S. 515 (1975); *Alaska (Beaufort Sea)*, *supra*.

There are sound reasons, beyond simply following tradition, for continuing the practice. Through the exercise of its original jurisdiction, this Court has developed an extensive body of law respecting federal-state boundary disputes. Furthermore, as Alaska notes (Alaska Br. in Support of Motion 7 n.2), federal-state boundary disputes resemble interstate boundary disputes, over which the Court has always exercised exclusive original jurisdiction. See 28 U.S.C. 1257(a); Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 200 (1993). In addition, Congress amended the Submerged Lands Act in 1986 to enable the United States and a State to settle federal-state boundary disputes with finality by fixing the otherwise ambulatory boundary through the mechanism of seeking a Supreme Court decree setting out fixed coordinates. See 43 U.S.C. 1301(b). The Court's unique statutory power to effect the fixing of federal-state boundaries through its decrees has provided an additional incentive for resolving disputes through the mechanism of an original action. See, *e.g.*, *United States* v. *Louisiana* (*Texas Boundary Case*), 525 U.S. 1 (1998) (decree fixing the United States-Texas boundary).

U.S. at 4. At Alaska's request, and with the United States' concurrence, the Court also resolved a dispute over whether the United States' creation of two important federal reservations along the Beaufort Sea—the National Petroleum Reserve-Alaska and the Arctic National Wildlife Refuge—deprived Alaska of submerged lands within the reservation boundaries. See *ibid.* Alaska's claims respecting submerged lands in the Tongass National Forest and Glacier Bay National Park and Reserve raise the same type of issues and may appropriately be considered in conjunction with Alaska's claims respecting the location of the federal-state boundary in the Alexander Archipelago.

B. Alaska's Complaint Satisfies The Threshold Prerequisites For An Original Action, Provided That Alaska's Claims For Relief Are Limited To Submerged Lands That Are Within The Administrative Jurisdiction Of The Forest Service Or The National Park Service

Although Alaska's proposed complaint poses the types of issues that this Court has traditionally entertained as an original action, the character of the issues, by itself, is not dispositive. The Court may properly decline to exercise jurisdiction if the complaint fails to satisfy the threshold prerequisites for commencing a quiet title suit against the United States or if the underlying dispute fails to present issues of sufficient practical importance to warrant the invocation of the Court's original jurisdiction.

1. The United States has a threshold jurisdictional concern with respect to Counts II and III. As we have explained (pp. 2-5, *supra*), a State may bring a quiet title action against the United States only in conformity with the QTA. The QTA requires, among other things,

that any plaintiff, including a State, set forth in its complaint not only the nature of the right, title, or interest that the plaintiff claims, but also "the right, title, or interest claimed by the United States." 28 U.S.C. 2409a(d). In addition, the QTA requires that the State provide 180 days' advance notice to "the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit." 28 U.S.C. 2409a(m). Alaska has provided adequate notice with regard to those marine submerged lands that are currently included in and administered by the Forest Service as a part of the Tongass National Forest and those submerged lands that are currently included in and administered by the National Park Service as part of Glacier Bay National Park and Preserve.

We read Alaska's complaint to place only those lands at issue in this case. But Alaska's complaint, when viewed in conjunction with the associated maps, could be construed to include not only the marine submerged lands currently included within and administered as part of the Tongass National Forest and the Glacier Bay National Park and Preserve, but also marine submerged lands within the same general area over which the Forest Service and the National Park Service do not claim administrative jurisdiction.[5] See, *e.g.*, Alaska Br. in Support of Motion 1-2 ("The lands subject to this action include all lands underlying marine waters

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[5] The tracts of concern could include, for example, marine submerged lands within the exterior boundaries of the reservations that: (1) were withdrawn for, or have been transferred to, other federal agencies; (2) are associated with conveyed uplands; (3) are held in trust or restricted status for Indian Tribes.

within the Tongass National Forest, created in 1907, and all lands underlying marine waters within Glacier Bay National Monument, created in 1925. The Tongass and Glacier Bay reservations encompass nearly all Southeast Alaska. See Exs. 1-3 (maps)."). Alaska has not provided the required notice to the appropriate federal land managers with respect to lands that are not administered by the Forest Service within the exterior boundaries of the Tongass National Forest or by the National Park Service within the exterior boundaries of Glacier Bay National Park and Preserve.

The tracts for which no notice has been given, though generally small, are potentially numerous and varied. They may include, for example, lighthouse sites administered by the Coast Guard, Indian cannery sites, and tidelands associated with Fish and Wildlife Service piers. The United States would be concerned, for both jurisdictional and practical reasons, if those tracts were included within this suit. The QTA's requirement that a State provide advance notice to the Federal land manager responsible for the particular lands in dispute of the location of the lands and the State's basis for contesting the United States's title is a condition on the United States' waiver of sovereign immunity, and Alaska's failure to provide such notice with respect to the tracts of concern would pose a jurisdictional obstacle to disputing their ownership. Cf. *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989). In addition, the QTA does not waive the United States' sovereign immunity with respect to lands held in trust or restricted status for Indian Tribes. 28 U.S.C. 2409a(a). And apart from those jurisdictional concerns, considerable resources could be expended by this Court and the parties in determining the location and status of small tracts that would be more appropriately litigated—if at

all—through an action in federal district court. See *United States* v. *Nevada*, 412 U.S. 534, 538 (1973) (per curiam) ("We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim.").

We have raised this concern with Alaska's counsel, and they have confirmed that Counts II and III of their complaint do not encompass the tracts of concern.[6] Rather, Alaska seeks to quiet title only with respect to those marine submerged lands within the exterior boundaries of the Tongass National Forest and the Glacier Bay National Park and Preserve that the United States claims as within the jurisdiction of the Forest Service or the National Park Service. On that understanding, the United States perceives no jurisdictional obstacles that would prevent the Court from proceeding with the claims set out in Alaska's complaint.[7]

2. Although Alaska's complaint appears to satisfy the threshold QTA requirements for invoking this Court's original jurisdiction, the Court nevertheless has discretion to deny Alaska's motion for leave to file its complaint on prudential grounds if, for example, the complaint fails to present an issue of sufficient practical importance to warrant resolution by this Court as an

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[6] Alaska has made that representation without prejudice to its right to move for leave to file a future original action under the QTA (after providing the required notice) in the event that the State determines that any of the tracts of concern gives rise to a case or controversy warranting this Court's exercise of its original jurisdiction.

[7] In making that observation, we do not waive our right to raise any defenses that normally would be presented after the filing of a complaint. See Fed. R. Civ. P. 12.

original matter. See *California* v. *Texas*, 457 U.S. 164, 168 (1982) ("A determination that this Court has original jurisdiction over a case, of course, does not require us to exercise that jurisdiction. We have imposed prudential and equitable limitations upon the exercise of our original jurisdiction."). We believe that the issues Alaska tenders, as described above, are sufficiently important to warrant this Court's attention.

In most of the previous occasions in which the United States or a State has invoked the Court's original jurisdiction to resolve an offshore federal-state boundary, the parties had reason to believe that the submerged lands in question might contain potentially valuable mineral resources. See note 4, *supra*. The question whether the United States or a State owned the submerged lands at issue typically resolved important practical questions respecting the division of leasing rights and royalties in the disputed areas. See, *e.g.*, *Alaska (Beaufort Sea)*, 521 U.S. at 4-5; *United States* v. *Louisiana*, 452 U.S. 726 (1981) (final decree establishing mechanism for division of mineral leasing revenues).

The submerged lands at issue in Alaska's proposed complaint are not known to have any substantial mineral value, and we are not aware of any disputes over mineral leasing rights in the disputed areas. Nevertheless, the United States submits that those submerged lands do not belong to the State, but instead constitute essential components of the Tongass National Forest and the Glacier Bay National Park and Preserve. Alaska's contrary view, which challenges the United States' international position respecting inland waters within the Alexander Archipelago and questions the United States' title to thousands of acres of territory within two important federal reservations, pre-

sents a sufficiently serious inter-sovereign dispute to warrant the exercise of the Court's original jurisdiction. Compare *New Jersey* v. *New York*, 523 U.S. 767, 770-771 (1998) (original action arising from competing sovereign claims to territorial jurisdiction over 24.5 acres of Ellis Island).[8]

C. Alaska's Complaint Presents Issues That Would Be Appropriate For Resolution Through The Assistance Of A Special Master

Alaska's brief in support of its motion for leave to file a complaint addresses in some detail the legal theories and evidence on which Alaska bases its claim for relief. See Alaska Br. in Support of Motion 12-29. It would be premature at this stage of the proceedings for the United States to respond at length to those legal arguments and factual assertions. Under the Court's normal practice, if the Court grants Alaska's motion for leave to file a complaint, it will direct the United States to file an answer and the case will proceed in general conformity with the Federal Rules of Civil Procedure. We can state at this stage, however, that the United

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[8] We note that various disputes have arisen over the years respecting the scope of federal and state authority to regulate marine resources and activities, such as fishing and pollution discharges, within the Alexander Archipelago. This suit cannot be expected to resolve those controversies because regulatory jurisdiction over offshore activities does not necessarily depend on the location of the Submerged Lands Act boundary or on who holds title to the submerged lands. See, *e.g.*, SLA § 6(a), 43 U.S.C. 1314(a). Nevertheless, this Court's determination of the location of that boundary and the ownership status of the underlying lands may have a bearing, in particular cases, on the ways in which the federal and state officials may discharge their respective regulatory responsibilities.

States has substantial responses to Alaska's claims for relief.

For example, the United States would dispute, on both legal and factual grounds, Alaska's assertion that the United States has continuously claimed the enclaves described in Count I as inland waters and that foreign nations have acquiesced in that claim. To the contrary, the United States has expressly disclaimed to the international community that the enclaves are inland waters. Cf. *Alaska (Cook Inlet)*, *supra*. In response to Counts II and III of Alaska's complaint, the United States would demonstrate, as a legal and factual matter, that the federal government drew the seaward boundaries of the Tongass National Forest and the Glacier Bay National Monument to include marine submerged lands in order to support the purposes of those reservations, and that the federal government retained those reservations, including the submerged lands, upon Alaska's entry into the Union. Cf. *Alaska (Beaufort Sea)*, 521 U.S. at 32-61.

Based on Alaska's allegations and the United States' anticipated responses, we think it clear that, if the Court grants Alaska's motion, the Court would benefit from the assistance of a special master. The issues are somewhat complicated and the parties are likely to dispute historical and other facts, which may ultimately require a trial. Accordingly, if the Court grants Alaska's motion for leave to file a complaint, it should follow its normal practice of granting the United States a suitable period of time to file an answer and then referring the matter to a master.

In our experience, the progress of original actions can be facilitated if the parties are able to reach agreement at the outset on a statement of the issues that would be placed before the the master. Counsel for the United

States and counsel for Alaska have reached agreement that the issues, as described at page I (Questions Presented), provide a fair description of the issues that the master would face in this case. That statement of the issues should be deemed to include, of course, all arguments and defenses fairly included therein. Furthermore, in stating the issues in this manner, neither party waives its right to seek this Court's leave to amend its pleadings or assert additional claims in the litigation, or to respond as it sees fit to any such amendment or introduction of new claims. Finally, the parties recognize that, if the Court allows the suit to go forward, they may be able to refine the statement of issues as the case progresses through completion of the pleading and discovery phases.

CONCLUSION

The motion of the State of Alaska for leave to file a bill of complaint should be granted.

Respectfully submitted.

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APRIL 2000

(1)

No. 128, Original

Supreme Court, U.S.
FILED
APR 25 2000
CLERK

IN THE

Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Motion for Leave to File a Complaint

REPLY BRIEF FOR PLAINTIFF

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IN THE

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Motion for Leave to File a Complaint

REPLY BRIEF FOR PLAINTIFF

The State of Alaska agrees with the United States that Alaska's complaint "satisf[ies] the threshold jurisdictional and prudential criteria for an original action," and that Alaska accordingly "should be granted leave to file its complaint." U.S. Br. at 14. Alaska further states as follows:

1. The hypothetical "jurisdictional concern" noted—but then dismissed—by the United States, *see id.* at 17-20, is just that. As the United States acknowledges, "Alaska has provided adequate notice with regard to those marine submerged lands that are currently included in and administered by the Forest Service as part of the Tongass National Forest and those submerged lands that are currently included in and administered by the National Park Service as part of Glacier

Bay National Park and Preserve." *Id.* at 18. Counts II and III of the State's complaint are by their terms addressed to those lands, and, as the United States agrees, "adequate notice" has been provided with respect to those lands. *Id.* at 18. Any tracts for which such notice has not been given are not at issue because, simply stated, they are not included within the State's complaint.

2. In an effort to simplify and facilitate this litigation, Alaska and the United States have attempted to summarize the issues raised by the State's complaint. *See id.* at 23-24. We agree with the United States that these issues should be referred to a Special Master appointed by this Court, with the understanding that these issues are necessarily preliminary in nature and that the parties "may be able to refine the statement of issues as the case progresses." *Id.* at 24. By agreeing to this "fair description of the issues," *id.*, neither party has waived its right to litigate "arguments or defenses fairly included therein," or to seek leave to assert new or different claims or defenses in the customary fashion.

3. In discussing Alaska's claims, the United States has purported to state what Alaska must establish "[t]o succeed on its claim[s]." *Id.* at 10; *see id.* at 12, 13. Similarly, the United States has summarized its legal "responses to Alaska's claims for relief," *id.* at 23, and proffered what it "would demonstrate" in response to Alaska's claims. *See id.* at 22-24. Such characterizations of law, arguments, and proffers are "premature at this stage," *id.* at 22, and Alaska in no way embraces them in agreeing with the United States that this action should be allowed to go forward. Alaska has set forth its claims and basic legal theories in its complaint and opening brief. Any further consideration of such matters should await full briefing and argument on the merits.

For present purposes, the Court need only take note that the parties agree that the instant territorial dispute is sufficiently weighty to rise to an original proceeding in this Court.

* * * *

For the foregoing reasons, and those in the State of Alaska's complaint and supporting brief, the Court should grant Alaska's motion for leave to file a complaint, direct the United States to file an answer, and, in accordance with the usual practice, refer the action to a Special Master.

Respectfully submitted,

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No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

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In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

ANSWER

The United States of America, by its Solicitor General, for its Answer to plaintiff State of Alaska's Complaint to Quiet Title, admits, denies, and alleges as follows:

1. The allegations of paragraph 1 of the Complaint are admitted, subject to the affirmative averment that numerous areas of tide and submerged lands, within the bounds described in paragraph 1 of the Complaint, are retained by the United States for purposes other than inclusion as part of the Tongass National Forest or Glacier Bay National Park and Preserve, and the title to such areas is not at issue in this proceeding.

2 The allegations of paragraph 2 of the Complaint are admitted.

3. The first sentence of paragraph 3 of the Complaint is a legal conclusion for which no response is required. The allegations contained in the second sentence of paragraph 3 are admitted as to Tongass National Forest and Glacier Bay National Park, subject to the affirmative averment that numerous withdrawals, reservations, and other federal appropriations, which may include tide and submerged lands and lie within the boundaries described in paragraph 1, were not the subject of any notice of intent to sue. Title to those areas is not at issue in this litigation.

Count I: Historic Waters of the Alexander Archipelago

4. Paragraph 4 of the Complaint is a conclusion of law for which no response is required.

5. The allegations of paragraph 5 of the Complaint are admitted.

6. Paragraph 6 of the Complaint is a conclusion of law for which no response is required.

7. The allegations of the first sentence of paragraph 7 of the Complaint are denied. With respect to the allegations in the second sentence of paragraph 7, the United States admits that Exhibit 1 to Alaska's Complaint presents a general depiction of certain areas at issue here.

8. The allegations of paragraph 8 of the Complaint are denied.

9. The allegations of paragraph 9 of the Complaint are denied.

10. The allegations of paragraph 10 of the Complaint are denied.

11. Paragraph 11 of the Complaint is a conclusion of law for which no response is required.

12. Section 6(m) of the Alaska Statehood Act speaks for itself and no other response to the allegation contained in paragraph 12 is required.

13. Paragraph 13 of the Complaint is a conclusion of law for which no response is required.

14. The allegations contained in the first sentence of paragraph 14 of the Complaint are admitted, except that the United States has insufficient knowledge upon which to form a belief as to the truth of the allegations that the United States drew the closing lines described in that sentence. With respect to the second sentence of paragraph 14, the United States admits only that some of the areas at issue are generally depicted in Exhibit 1 to Alaska's submission.

15. The allegations of paragraph 15 of the Complaint are denied.

16. The allegations of paragraph 16 of the Complaint are admitted.

17. The allegations of paragraph 17 of the Complaint are admitted.

18. The allegations of paragraph 18 of the Complaint are admitted.

19. The allegations of paragraph 19 of the Complaint are admitted.

20. The allegations of paragraph 20 of the Complaint are denied.

21. The allegations of paragraph 21 of the Complaint are denied. Alaska has no title to the described submerged lands. The United States acknowledges that Alaska's *claim of title* is adverse to and is clouded by the title of the United States.

22. The allegations of paragraph 22 of the Complaint are denied.

Count II: The Tongass National Forest

23. The allegations of paragraph 23 of the Complaint are responded to as set out above.

24. The allegations of paragraph 24 of the Complaint are denied.

25. The allegations of paragraph 25 of the Complaint are denied.

26. The allegations of paragraph 26 of the Complaint are denied.

27. With respect to paragraph 27 of the Complaint, the United States admits that it claims an interest in the tidelands and submerged lands within the boundaries of the Tongass National Forest and that that interest is disputed by Alaska. The United States denies that Alaska holds title to such lands.

28. The allegations of paragraph 28 of the Complaint are denied.

Count III: Glacier Bay National Monument

29. The allegations of paragraph 29 of the Complaint are responded to as set out above.

30. With respect to the allegations of paragraph 30 of the Complaint, the United States admits only that the Antiquities Act was one authority for the withdrawal of Glacier Bay National Monument.

31. The 1925 Executive order speaks for itself and no further response is required.

32. Paragraph 32 of the Complaint is a conclusion of law for which no response is required.

33. With respect to the allegations of paragraph 33 of the Complaint, the United States admits only that one of the purposes of the 1925 creation of Glacier Bay National Monument was to preserve the land left bare by the retreat of tidewater glaciers for study of the development of flora and fauna.

34. The allegations of paragraph 34 of the Complaint are denied.

35. The allegations of paragraph 35 of the Complaint are denied.

36. With respect to the allegations of paragraph 36 of the Complaint, the United States admits only that the Antiquites Act was one authority for the expansion of Glacier Bay National Monument.

37. The allegations of paragraph 37 of the Complaint are admitted.

38. With respect to the allegations contained in paragraph 38 of the Complaint, the United States admits only that two of the purposes of the 1939 expansion of Glacier Bay National Monument were to set aside a refuge for brown bears and to preserve the coastal forest.

39. The allegations of paragraph 39 of the Complaint are denied.

40. The allegations of paragraph 40 of the Complaint are denied.

41. The allegations of paragraph 41 of the Complaint are denied.

42. The allegations of paragraph 42 of the Complaint are denied.

43. The allegations of paragraph 43 of the Complaint are denied, except that the United States admits that its title is disputed by Alaska.

44. The allegations of paragraph 44 of the Complaint are denied.

Prayer For Relief

WHEREFORE, the United States prays for the following relief:

A. That judgment be entered quieting title of the United States in and to the subject lands and declaring

that the State of Alaska has no right, title, or interest in or to said lands and that the State of Alaska be forever barred from asserting any claim whatsoever in the subject lands or any part thereof adverse to the United States.

B. That said judgment enjoin the State of Alaska, its privies, assigns, lessees, and other persons claiming under it from interfering with the rights of the United States in said lands.

C. For such further relief as this Court may deem just and proper.

Respectfully submitted.

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AUGUST 2000

MOTION FILED
DEC 14 2000

(5)

No. 128, Original

IN THE

Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Motion for Leave to File an Amended Complaint

ALASKA'S UNOPPOSED MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT, AMENDED COMPLAINT, AND BRIEF IN SUPPORT OF MOTION

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APPENDIX

Article 7 of the International Convention on the Territorial Sea and the Contiguous Zone

IN THE

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

UNOPPOSED MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Pursuant to S. Ct. Rule 17, the State of Alaska, through its Attorney General, asks leave of the Court to file an amended complaint against the United States to quiet title to the lands underlying marine waters in Southeast Alaska. This motion is accompanied by an amended complaint and supporting brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT TO QUIET TITLE

The State of Alaska, plaintiff, alleges as follows:

1. This is an action to quiet title to the tide and submerged lands in Southeast Alaska. These include the submerged lands within the Alexander Archipelago of Southeast Alaska that are enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration, together with the submerged lands extending three miles seaward from that line and from the remainder of Southeast Alaska's coast line (as shown on the map at Exhibit ("Ex.") 1*); or alternatively, the submerged lands underlying the inland waters of the juridical bays within the Alexander Archipelago (as shown on the map at Ex. 2), together with the submerged lands extending three miles seaward from any juridical bay closing

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* Exhibits referenced herein are appended to the accompanying Brief in Support of Unopposed Motion for Leave to File an Amended Complaint.

lines or baselines, and from the remainder of Southeast Alaska's coast line.

2. This Court has jurisdiction under Article III, Section 2, Clause 2, of the United States Constitution and 28 U.S.C. § 1251(b)(2).

3. The United States consented to this action in 28 U.S.C. § 2409a(a). Alaska gave the United States written notice of its intent to file suit to quiet title to these lands on or about August 21, 1998 and March 22, 1999, as required by 28 U.S.C. § 2409a(m).

Count I: Historic Waters of the Alexander Archipelago

4. Upon admission to the Union on an equal footing with the other States, a new State succeeds to the United States' title to lands underlying navigable inland waters within its boundaries as an incident of its sovereignty.

5. Alaska was admitted to the Union "on an equal footing with the other States in all respects whatever" on January 3, 1959. Alaska Statehood Act § 1, Pub. L. No. 85-508, 48 U.S.C. note prec. § 21.

6. Under the equal footing doctrine, Alaska succeeded to the United States' title to lands underlying navigable inland waters within Alaska's boundaries as an incident of statehood.

7. From at least 1903 until 1971, the United States took the position in its international relations and in litigation with the States in this Court that the waters of the Alexander Archipelago were inland waters, including the pockets and enclaves that are more than three miles from the coast line of the mainland and any of the islands and enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration (hereinafter "pockets and enclaves"). These pockets and enclaves are depicted in red on the map at Ex. 1.

8. Foreign nations acquiesced in the United States' claim that the waters of the Alexander Archipelago were inland waters, including the pockets and enclaves.

9. All of the submerged lands within these pockets and enclaves underlie navigable historic inland waters.

10. Because all of the submerged lands within the pockets and enclaves underlie navigable historic inland waters, Alaska took title to them upon its admission to the Union under the equal footing doctrine.

11. Congress both confirmed the equal footing doctrine rule of State ownership of lands underlying navigable inland waters and quitclaimed to the States the offshore submerged lands within state boundaries in the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315.

12. Congress made the Submerged Lands Act applicable to Alaska in Section 6(m) of the Alaska Statehood Act.

13. Congress defined Alaska's boundaries as coextensive with the three-mile territorial sea claimed by the United States at the time of Alaska's admission to the Union on January 3, 1959.

14. The United States claims an interest in the submerged lands within the pockets and enclaves, and also claims the submerged lands extending three miles seaward of the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal arbitration (hereinafter "1903 closing lines") where the submerged lands are more than three nautical miles from any point on the coast line of the mainland or any of the islands. The latter areas are depicted in dark blue on the map at Ex. 1.

15. Because the submerged lands within the pockets and enclaves and extending three miles seaward of the 1903 closing lines passed to Alaska at statehood under the equal

footing doctrine and the Submerged Lands Act, the United States has no right, title, or interest in those lands.

16. On or about September 10, 1907, President Theodore Roosevelt reserved by proclamation an area of Southeast Alaska as the Tongass National Forest.

17. In 1908, President Theodore Roosevelt consolidated the Tongass National Forest with the Alexander Archipelago Forest Reserve and named the new entity Tongass National Forest.

18. On or about February 16, 1909, President Theodore Roosevelt enlarged the Tongass National Forest.

19. On or about June 10, 1925, President Calvin Coolidge again enlarged the Tongass National Forest. See Ex. 2 (map with the 1925 enlargement and resulting outer boundaries of the Tongass National Forest).

20. Although the pockets and enclaves and the submerged lands extending three miles seaward of the 1903 closing lines are within the outer boundaries of the Tongass National Forest shown on the map at Ex. 2, the reservation of lands within these boundaries did not reserve the submerged lands therein or defeat Alaska's title to them at statehood.

21. Alaska's title is adverse to and clouded by the United States' claim of title to the lands underlying the pockets and enclaves and the waters extending three miles seaward of the 1903 closing lines where the submerged lands are more than three miles from any point on the coast line of the mainland or any of the islands.

22. Unless this Court declares and establishes Alaska's rights, Alaska will continue to be injured by the United States' claims to the lands underlying the pockets and enclaves and the waters extending three miles seaward of the 1903 closing lines where the submerged lands are more than

three miles from any point on the coast line of the mainland or any of the islands.

Count II: The Juridical Bay Status of the Waters of the Alexander Archipelago

23. Paragraphs 1-6, 11-13, and 16-19 are realleged and incorporated by reference.

24. The submerged lands underlying any juridical bay and enclosed behind closing or base lines drawn in accordance with Article 7 of the International Convention on the Territorial Sea and the Contiguous Zone (hereinafter "Convention"), Sept. 10, 1964, 15 U.S.T. 1607, T.I.A.S. No. 5639, are inland waters, and any such juridical bay closing or base lines constitute the coastline (or seaward limits of inland waters) within the meaning of the Submerged Lands Act.

25. Regardless of their historic inland water status, the waters within the Alexander Archipelago are inland (or internal) waters because the area comprises two smaller and two larger juridical bays, whose waters are enclosed behind closing or base lines drawn in accordance with Article 7 of the Convention (hereinafter "juridical bay closing lines").

26. Sitka Sound and Cordova Bay constitute the two smaller juridical bays. *See* Ex. 2 (the locations of Sitka Sound and Cordova Bay are labeled on the graphic, but are not otherwise highlighted).

27. The area between Cape Spencer and the southern or eastern entrance point to Chatham Strait constitutes one of the larger juridical bays, hereinafter "North Southeast." *See* Ex. 2 ("North Southeast" area depicted in green). Another larger juridical bay lies between the northern or western entrance point to Sumner Strait and Cape Fox, hereinafter "South Southeast." *See* Ex. 2 ("South Southeast" area depicted in purple).

28. Each bay is composed of a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast.

29. For each bay, islands that serve to form the indentation may be assimilated to the mainland.

30. Each bay contains an area as large or larger than that of a semi-circle whose diameter is the length of the line or sum length of the lines drawn across the mouth or mouths of the indentation, considering that islands within an indentation may be considered as part of the water area of the indentation. Islands within the indentation or creating more than one mouth under Article 7(3) of the Convention are depicted in gray on Exhibit 2.

31. Each bay contains inland waters that are enclosed by a closing line or lines, drawn between the natural entrance points, whose aggregate length does not exceed 24 nautical miles, or that are enclosed by 24 nautical mile baselines that may be drawn landward of the natural entrance points. Exhibit 2 depicts approximate juridical bay closing or base lines for the two larger juridical bays.

32. In the alternative, the area described above as "South Southeast" comprises more than one juridical bay.

33. Each of the juridical bays of "South Southeast" is composed of a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast.

34. For each of the juridical bays of "South Southeast", islands that serve to form the indentation may be assimilated to the mainland.

35. Each of the juridical bays of "South Southeast" contains an area as large or larger than that of a semi-circle whose

diameter is the length of the line or sum length of the lines drawn across the mouth or mouths of the indentation, considering that islands within an indentation may be considered as part of the water area of the indentation.

36. Each of the juridical bays of "South Southeast" contains inland waters that are enclosed by a closing line or lines, drawn between the natural entrance points, whose aggregate length does not exceed 24 nautical miles, or that are enclosed by 24 nautical mile baselines that may be drawn landward of the natural entrance points.

37. The United States claims an interest in those submerged lands enclosed behind the juridical bay closing lines that are more than three miles from the coast line of the mainland and any of the islands, and also claims an interest in those submerged lands extending three miles seaward of the juridical bay closing lines where the submerged lands are more than three nautical miles from any point on the coast line of the mainland or any of the islands.

38. All of the submerged lands enclosed behind the juridical bay closing lines, and all of the submerged lands extending three miles seaward of the juridical bay closing lines, passed to Alaska at statehood under the equal footing doctrine and the Submerged Lands Act. Accordingly, the United States has no right, title, or interest in those lands.

39. The submerged lands enclosed behind the juridical bay closing lines, and the submerged lands extending three miles seaward of the juridical bay closing lines, are within the outer boundaries of the Tongass National Forest shown on the map at Ex. 3. The reservation of lands within these boundaries, however, did not reserve the submerged lands therein or defeat Alaska's title to them at statehood.

40. Alaska's title is adverse to and clouded by the United States' claim of title to those submerged lands enclosed behind the juridical bay closing lines that are more than three

miles from the coast line of the mainland and any of the islands, and the submerged lands extending three miles seaward of the juridical bay closing lines where the submerged lands are more than three miles from any point on the coast line of the mainland or any of the islands.

41. Unless this Court declares and establishes Alaska's rights, Alaska will continue to be injured by the United States' claim to those submerged lands enclosed behind the juridical bay closing lines that are more than three miles from the coast line of the mainland and any of the islands, and the submerged lands extending three miles seaward of the juridical bay closing lines where the submerged lands are more than three miles from any point on the coast line of the mainland or any of the islands.

Count III: The Tongass National Forest

42. Paragraphs 1-6, 11-13, and 16-19 are realleged and incorporated by reference.

43. Alaska took title to all lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest when it entered the union on January 3, 1959. *See* Ex. 3 (map showing boundaries).

44. Although the lands described in paragraph 43 are within the lines delimiting the public lands withdrawn and reserved for the Tongass National Forest, the withdrawal and reservation of lands within the boundaries did not reserve or defeat Alaska's title to those submerged lands.

45. Because Alaska took title to the lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest at statehood, the United States has no right, title, or interest in those lands.

46. The United States claims an interest in these lands that is disputed by Alaska and creates a cloud on Alaska's title to them.

47. The United States' claims to these lands will continue to cloud Alaska's title unless this Court declares and establishes Alaska's rights.

Count IV: Glacier Bay National Monument

48. Paragraphs 1-6 and 11-13 are realleged and incorporated by reference.

49. On or about February 26, 1925, President Calvin Coolidge created Glacier Bay National Monument by issuing Proclamation 1733 under the authority of the Antiquities Act of 1906, 34 Stat. 223, 16 U.S.C. §§ 431-433.

50. The President set apart as Glacier Bay National Monument "the tract of land" lying within the boundaries described in the 1925 order. *See* Ex. 4 (1939 map depicting 1925 boundaries in purple).

51. The Antiquities Act permits the President "to declare * * * historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest * * * to be national monuments," but permits the reservation of only "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

52. The primary purpose of the 1925 creation of Glacier Bay National Monument was to preserve the land left bare by the retreat of tidewater glaciers for study of the development of flora and fauna.

53. The President did not intend to include as part of the monument the lands underlying marine waters within the boundary described in Proclamation 1733.

54. Given the purposes of the monument, the President's authority to withdraw and reserve lands under the Antiquities

Act did not extend to the submerged lands within the boundaries described by the 1925 reservation order.

55. On or about April 18, 1939, President Franklin D. Roosevelt expanded the area of Glacier Bay National Monument by issuing Proclamation 2330 under the authority of the Antiquities Act.

56. The Proclamation added to Glacier Bay National Monument certain public lands, including lands simultaneously excluded from the Tongass National Forest. *See* Ex. 4 (lands transferred from the Tongass National Forest to Glacier Bay National Monument depicted between the red and green lines).

57. The primary purposes of the 1939 expansion of Glacier Bay National Monument were to set aside a refuge for brown bears and to preserve a coastal forest.

58. The lands underlying marine waters within the 1939 boundary of the newly expanded monument were unrelated to the purposes of a bear refuge and a forest preserve and therefore exceeded "the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. § 431.

59. The President did not intend to include as part of the monument the lands underlying marine waters within the boundaries described in Proclamation 2330.

60. The President's authority to reserve lands under the Antiquities Act did not extend to the submerged lands within the boundaries described by the 1939 proclamation.

61. The State of Alaska took title to all the lands underlying marine waters within the boundaries of Glacier Bay National Monument at statehood, pursuant to the Equal Footing Doctrine and the Submerged Lands Act.

62. The United States' claim of title to the lands underlying marine waters within the boundaries of Glacier Bay National Monument as they were drawn at statehood is adverse to and disputed by Alaska and creates a cloud on Alaska's title to those lands.

63. The United States' claim of title to these lands will continue to cause injury to Alaska unless this Court declares and establishes Alaska's rights.

PRAYER FOR RELIEF

Alaska prays that the Court require the United States to answer Alaska's Amended Complaint and that, after due proceedings, the Court enter a decree declaring the rights of Alaska as against the United States in the submerged lands within the Alexander Archipelago of Southeast Alaska that are enclosed behind the closing lines drawn by the United States to mark the seaward limit of inland waters at the 1903 Alaska Boundary Tribunal Arbitration or enclosed behind the juridical bay closing lines, together with the submerged lands extending three miles seaward from such lines and the remainder of Southeast Alaska's coast line, and enjoining the United States, its privies, assigns, lessees, and other persons claiming under it from interfering with the rights of Alaska, as well as award Alaska any other relief the Court may deem just and appropriate.

Respectfully submitted,

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Counsel for Plaintiff

IN THE

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

BRIEF IN SUPPORT OF UNOPPOSED MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

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BRIEF IN SUPPORT OF UNOPPOSED MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

The State of Alaska, through its Attorney General, submits this brief in support of its Unopposed Motion for Leave to File an Amended Complaint. The amended complaint includes a new count asserting title based on a juridical bay theory of inland water status for the waters of Alexander Archipelago in Southeast Alaska. The United States has authorized Alaska to state that while the United States disputes the merits of Alaska's claims, it does not oppose granting the motion for leave to file an amended complaint.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Article III, § 2, cl. 2 of the United States Constitution and 28 U.S.C. § 1251(b)(2).

PROCEDURAL HISTORY

Alaska filed its Motion for Leave to File a Complaint and Brief in Support of its Motion with the Court on November 24, 1999. In its complaint, Alaska sets forth a quiet title action against the United States, which seeks to establish ownership of the tide and submerged lands within the Alexander Archipelago of Southeast Alaska. Count I of the complaint asserts that title to the submerged lands underlying the marine waters of the area passed to the state under the equal footing doctrine as historic inland waters. Counts II and III of the initial complaint allege that the submerged lands between mean high tide and three miles seaward of the coast line and within the exterior boundaries of the Tongass National Forest and Glacier Bay National Monument, respectively, passed to the state at statehood under the equal footing doctrine and Submerged Lands Act. In its brief in support of its motion for leave to file its complaint, Alaska's primary argument was that the Court has historically exer-

cised and even preferred original jurisdiction to resolve coastal boundary disputes such as that presented by Alaska.

In its brief in response, the United States agreed with Alaska that leave should be granted to permit Alaska to file its bill of complaint because of the type of issues raised. After hearing from Alaska in reply, the Court, on June 9, 2000, granted leave for Alaska to file its bill of complaint. The United States filed its answer on August 25, 2000. On October 16, 2000, the Court appointed Professor Gregory E. Maggs to serve as Special Master. No substantive proceedings have yet taken place before the Special Master.

Alaska appreciates that the Court has appointed a Special Master in this case with "authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings." October 16, 2000 Order. But because Alaska's request for leave to file its amended complaint is a matter that goes to the Court's jurisdiction, Alaska has filed its request with the Court in the first instance.

REASONS FOR GRANTING LEAVE TO FILE AN AMENDED COMPLAINT

The first count advanced in Alaska's original complaint alleges that the marine areas within the Alexander Archipelago of Southeast Alaska passed to the State of Alaska as historic inland waters under the equal footing doctrine. These areas include those enclosed behind the closing lines (not exceeding 10 miles) described by the United States at the 1903 Alaska Boundary Tribunal as forming the "political coastline" around the outside of the archipelago. *See* Ex. 1 to both the original and the amended complaint. Additional study and consultation with experts retained since the Court granted Alaska leave to file its complaint have led Alaska to conclude that its position is also supported by a juridical bay theory. As a result, Alaska now seeks to amend its complaint in order to permit its use of a juridical bay theory as an

alternative to the historic waters claim to resolve Alaska's claim to title.[1]

Given that no substantive proceedings have occurred in this case since the Court accepted jurisdiction, this request for leave to amend is timely and will not prejudice the United States. While the Court has granted leave to amend years after the filing of the original pleadings, *Nebraska* v. *Wyoming*, 515 U.S. 1, 12, 13 (1995), this litigation is still at an early stage. The Special Master was only recently appointed, no discovery has yet been taken, and the additional count can readily be incorporated into the case management plan currently under development. *See* Ex. 5 (Case Management Order No. 2). Furthermore, the amendment would not change the nature of this case and fully comports with the standards governing juridical bay claims.

This Court has held that leave to amend a complaint within the Court's original jurisdiction will be granted so long as the amendment would not "take the litigation beyond what [was] reasonably anticipated when [the Court] granted leave to file the initial pleadings." *Nebraska* v. *Wyoming*, 515 U.S. at 8. The proposed amended complaint would not do so. The amended complaint does not alter the nature of this case as one seeking to quiet title to the lands underlying the marine waters in Southeast Alaska, nor does it expand the disputed lands to which Alaska asserts title.[2] Both the original and

---

[1] Alaska also seeks quiet title to the three mile belt of territorial sea measured from the closing lines attained under either theory. *See* Complaint ¶ 15 (Count I); Amended Complaint ¶ 15 (Count I), ¶ 38 (Count II). But such claim to areas of territorial sea under the Submerged Lands Act, 43 U.S.C. § 1312, needs no separate discussion since it is wholly dependant on the success of Alaska's claim of title under the inland water theories.

[2] There is not a perfect identity between the closing or baselines marking the seaward limits of inland waters under the historic waters theory and juridical bay theory. But the minor differences

amended complaints seek title to the submerged lands underlying the Alexander Archipelago on the grounds that they comprise inland waters which passed to Alaska at statehood under the equal footing doctrine as an attribute of sovereignty. The only difference between the two complaints is that the amended complaint, in addition to asserting in Count I that the waters of the Alexander Archipelago are inland waters based on the United States' assertion and maintenance of dominion over the area, also asserts in Count II the alternative theory that the inland water status is dictated by the geographic configuration of the area, which satisfies the criteria set for juridical bays.[3]

Permitting Alaska to amend its complaint to put before the Court both theories of inland water status to support its claim of title to the disputed areas does not ask the Court to consider a matter of any less import than that supporting its initial decision to accept Alaska's case under its original jurisdiction. Alaska's sovereign interest in the lands underlying inland waters is the same under both counts I and II of the amended complaint. Permitting the amendment would also comport with the Court's past practice in other coastal boundary disputes within its original jurisdiction, in which the Court has considered both historic and juridical bay theories together. *See, e.g., United States* v. *Louisiana (Alabama & Mississippi Boundary Case)*, 470 U.S. 93, 100-101 (1985);

in the areas claimed are not such that adding the juridical bay claim would take the litigation of Alaska's title dispute beyond consideration of the waters of the Alexander Archipelago in Southeast Alaska, a matter the Court has already elected to decide.

[3] The historic claim to the area of the Alexander Archipelago is of course not divorced from its geography. But a claim of historic title to an area need not satisfy the particular or precise geographic test applied to juridical bays. *See United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 23 (1969); International Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1607, T.I.A.S. No. 5639.

United States v. *Maine*, 469 U.S. 504, 509 (1985); *United States* v. *Louisiana*, 420 U.S. 529 (1975); *United States* v. *California*, 381 U.S. 139, 169-170, 172 (1965). As in those cases, the interest of judicial economy would be furthered by considering both claims together in this case.

The Court has already agreed to hear Alaska's claim that the waters of the Alexander Archipelago are inland waters based on their historic treatment. Alaska seeks to establish, in the alternative, that these same waters are inland waters based on their geography. Both claims call upon the special expertise this Court has developed in resolving coastal boundary disputes between States and the Federal Government. This Court has held that juridical bay claims are governed by the standards in Article 7 of the International Convention on the Territorial Sea and the Contiguous Zone (the "Convention"), Sept. 10, 1964, 15 U.S.T. 1607, T.I.A.S. No. 5639 (reproduced in the Appendix hereto). *See United States* v. *Maine*, 469 U.S. at 514-520 (adopting and applying Article 7); *United States* v. *California,* 381 U.S. at 163-165 (same); *Louisiana Boundary Case*, 394 U.S. at 16, 35 (same). The amended complaint alleges that the bays of Southeast Alaska, denoted on Exhibit 2, feature the requisite geographic characteristics to satisfy the standards of the Convention, because each of the areas is a well-marked deeply penetrating indentation containing landlocked waters that passes the Convention's "semi-circle" test. *See* Convention, art. 7(2), 7(3); Amended Complaint ¶¶ 28, 30, 33, 35. Moreover, the complaint alleges that islands can be assimilated to the mainland so as to form part of the headlands to the bays. *See Louisiana Boundary Case*, 394 U.S. at 60-66; *United States* v. *Maine*, 469 U.S. at 514-520; Amended Complaint ¶ 29, 34. Finally, the complaint alleges that all the disputed waters are inland waters under the Convention because they can be enclosed behind closing lines totaling no more than 24 miles. *See* Convention, art. 7(4), 7(5); Amended Complaint ¶¶ 31, 36; *see also* Convention, art. 5(1). Alaska therefore

seeks to present proof on these issues in order to ensure that its sovereign interest in the area is fully recognized.

CONCLUSION

In this original action, Alaska's complaint has put before the Court the important question of whether the waters of the Alexander Archipelago are properly considered inland waters that passed to the state under the equal footing doctrine. The proposed addition of the juridical bay count would merely add a second inland water theory and permit Alaska the chance to present additional evidence to answer that general question. Because Alaska's claim to title based on a juridical bay theory raises the same important sovereign concerns as its pending historic waters claim, is addressed to the same general area, and even asks the same general question, leave to amend the complaint should be granted.

Respectfully submitted,

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2. Map depicting the juridical bays of Southeast Alaska..... 2e

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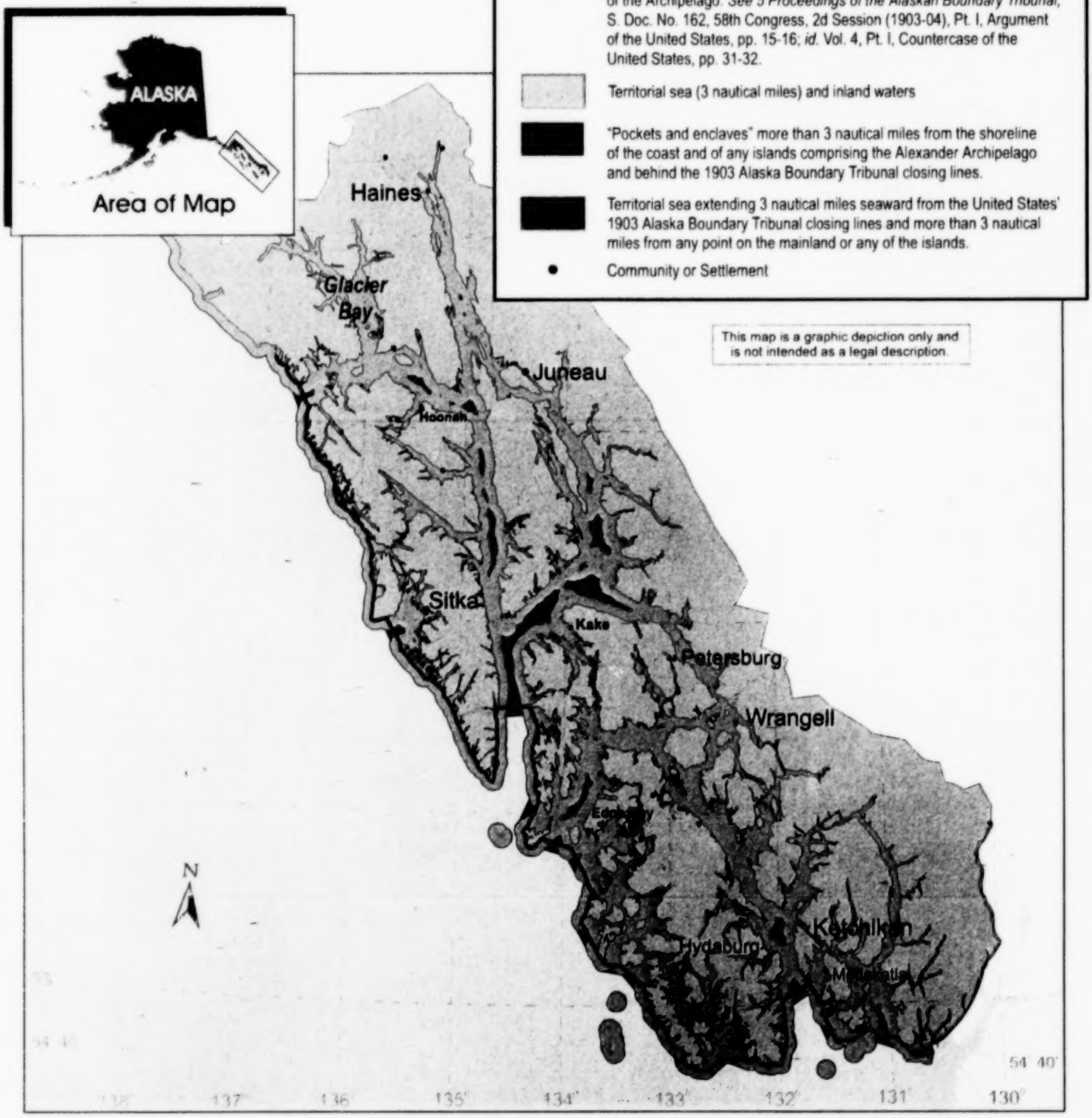
EXHIBIT 1

Historic Waters of Alexander Archipelago



Graphic depiction of closing lines drawn by the United States at the 1903 Boundary Tribunal to mark the seaward limits of the inland waters of the Archipelago. *See 5 Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Congress, 2d Session (1903-04), Pt. I, Argument of the United States, pp. 15-16; *id.* Vol. 4, Pt. I, Countercase of the United States, pp. 31-32.

Territorial sea (3 nautical miles) and inland waters

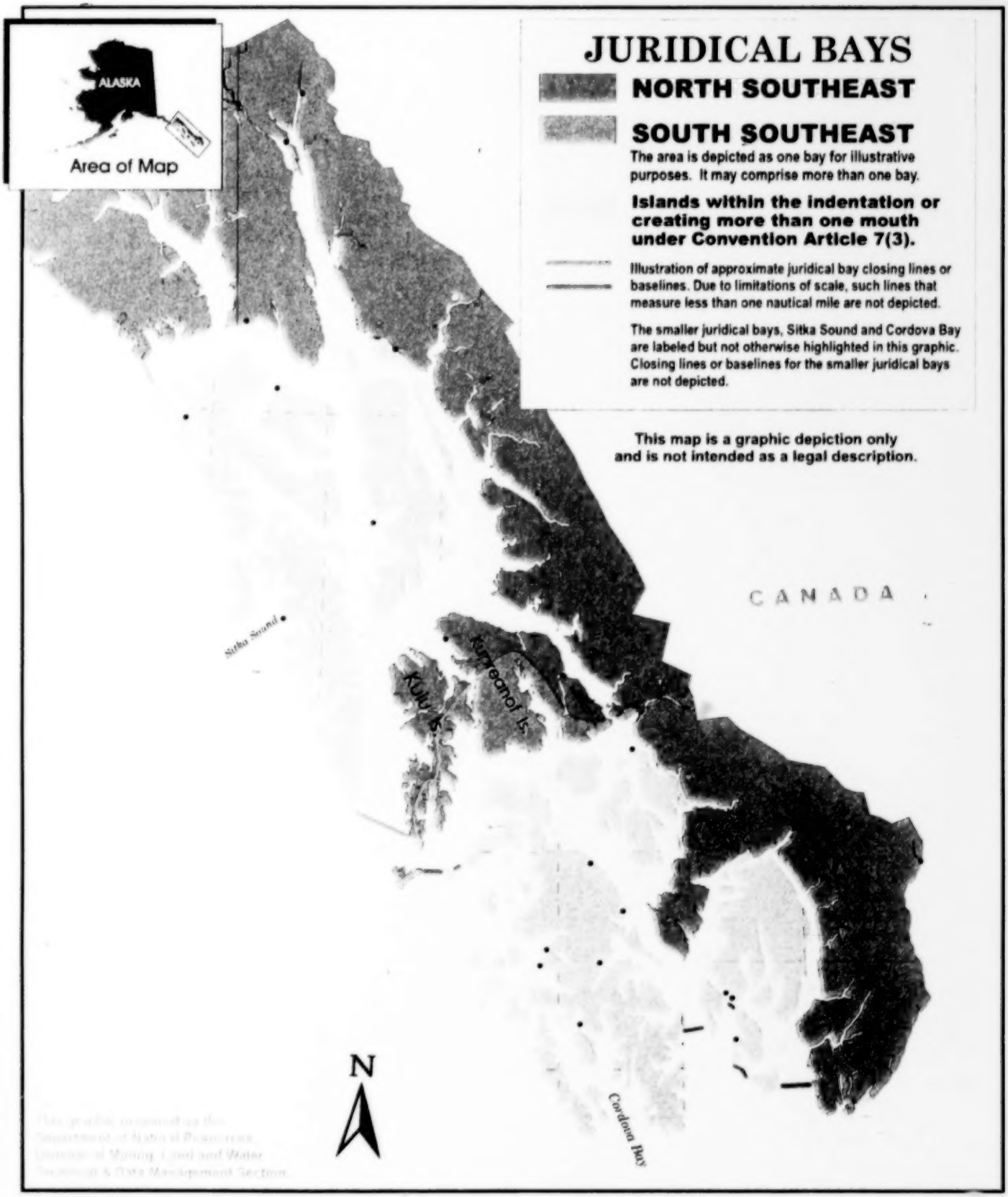
"Pockets and enclaves" more than 3 nautical miles from the shoreline of the coast and of any islands comprising the Alexander Archipelago and behind the 1903 Alaska Boundary Tribunal closing lines.

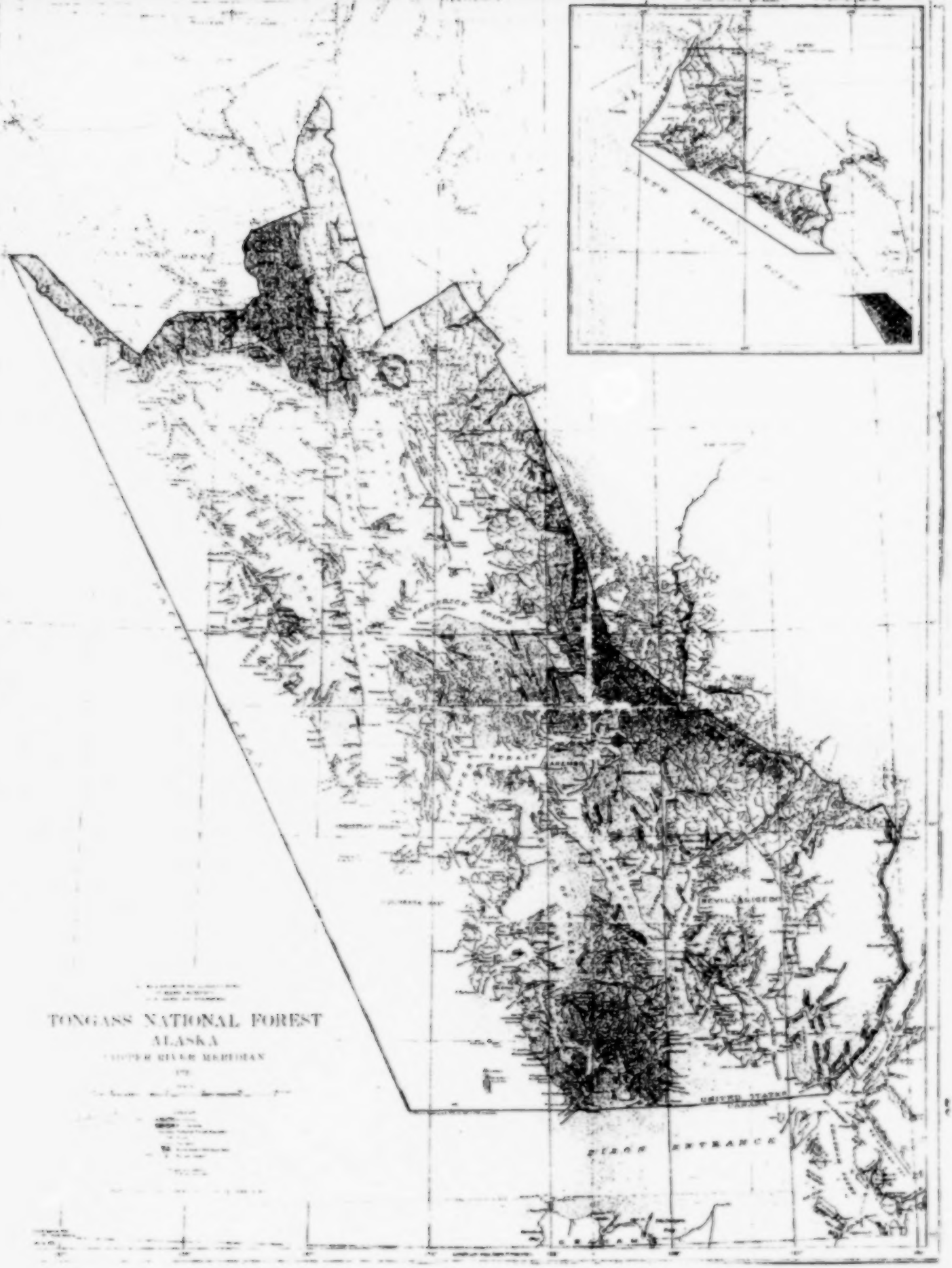
Territorial sea extending 3 nautical miles seaward from the United States' 1903 Alaska Boundary Tribunal closing lines and more than 3 nautical miles from any point on the mainland or any of the islands.

Community or Settlement

This map is a graphic depiction only and is not intended as a legal description.

Prepared by the Department of Natural Resources, Division of Mining, Land & Water - Technical & Data Management Section ***October, 1999***


ALASKA
Area of Map
JURIDICAL BAYS
NORTH SOUTHEAST
SOUTH SOUTHEAST
The area is depicted as one bay for illustrative purposes. It may comprise more than one bay.
Islands within the indentation or creating more than one mouth under Convention Article 7(3).
Illustration of approximate juridical bay closing lines or baselines. Due to limitations of scale, such lines that measure less than one nautical mile are not depicted.
The smaller juridical bays, Sitka Sound and Cordova Bay are labeled but not otherwise highlighted in this graphic. Closing lines or baselines for the smaller juridical bays are not depicted.
This map is a graphic depiction only and is not intended as a legal description.
CANADA
Sitka Sound
Kuiu I.
Kupreanof Is.
Cordova Bay
N



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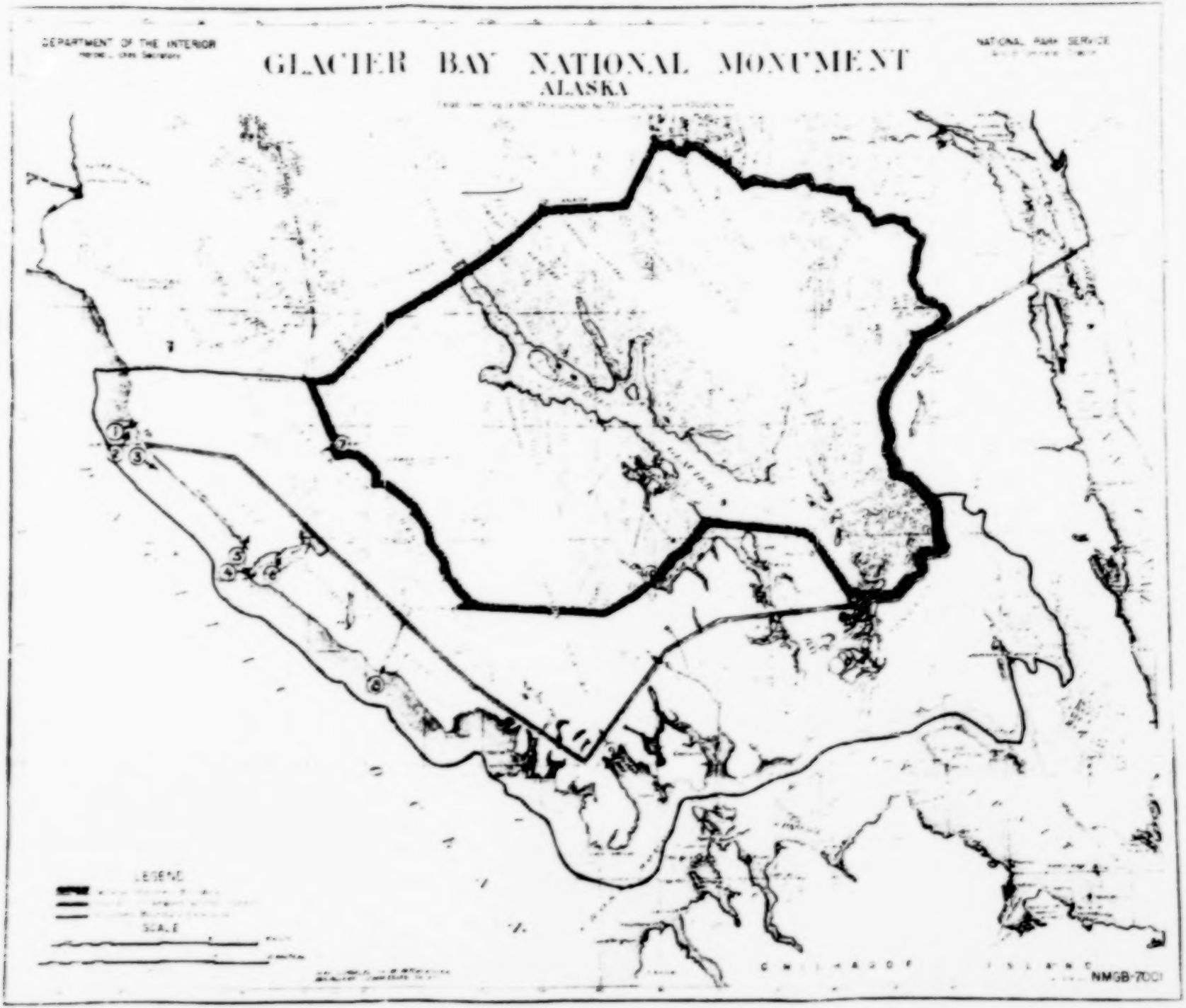
DEPARTMENT OF THE INTERIOR
GLACIER BAY NATIONAL MONUMENT
ALASKA
NATIONAL PARK SERVICE
LEGEND
SCALE
NMGB-7001

EXHIBIT 5

SUPREME COURT OF THE UNITED STATES
No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE MANAGEMENT ORDER NO. 2

For the purposes of the proceedings before the Special Master, IT IS HEREBY ORDERED THAT:

(1) Revised Distribution List for Service of Documents. A revised Distribution List for Service of Documents appears in the Appendix to this order. Please note the following amendments:

(a) Ms. Joanne M. Grace, Assistant Attorney General for the State of Alaska, now has the following fax number: (907) 279-2834.

(b) Documents now will be sent to the Special Master's legal assistant, who has the following address:

Mr. Paul Rosenzweig
Rosenzweig Law Office, LLP
516 C Street N.E., Suite 300
Washington, DC 20002

Tel. (202) 543-9370
Fax. (202) 543-9372

(2) Method of Distributing Documents. When distributing documents, the parties and the Special Master will send two copies of each document to each of the attorneys on the Distribution List for Service of Documents. The parties will send all documents by "standard overnight" delivery whenever possible, recognizing that "standard overnight" service to or from Alaska may not be available or may take more than one day. If "standard overnight" delivery is not available to a particular location, the parties will use the next fastest available delivery alternative. To prevent loss or misplacement of documents, the parties and the Special Master will not send documents by facsimile or email absent exceptional circumstances.

(3) Case Management Plan. The parties will draft and distribute a proposed Case Management Plan by January 16, 2001. In drafting the proposed plan, the parties will, to the extent that it is applicable, use as a guide the Comprehensive Case Management Plan adopted in No. 126, Original, Kansas v. Nebraska and Colorado. If the parties are unable to agree on a particular issue in drafting the Case Management Plan, each side will offer its own proposal for resolving the issue, and each side will briefly state its objections to the other side's proposal.

(4) List of Principal and Subsidiary Issues. To facilitate discovery and future planning, the parties will draft and distribute by January 16, 2001, a list of the principal issues to be decided by the Special Master, and so many of the subsidiary issues as the parties are able to identify at that time. If the parties cannot reach full agreement, they will note their disagreements. Although the parties should strive to make the list as comprehensive as information will allow, failure to include an issue on the list will not prevent the parties from raising the issue later. To the extent that the parties cannot

fully identify all subsidiary issues to be decided by the Special Master, they shall provide a time table for their identification in the proposed Case Management Plan.

(5) Timing of Case Status Conference No. 2. Prior to January 1, 2001, the parties will provide the Special Master a list of proposed dates and times in February for holding Case Status Conference No. 2 in Washington, D.C. At Case Status Conference No. 2, the parties and the Special Master will discuss the proposed Case Management Plan, the list of Principal and Subsidiary Issues, and other topics that may arise. Please note that the Special Master cannot meet on Wednesday, Thursday, and Friday mornings.

(6) Amicus Parties. Any party wishing to participate as an amicus party in this litigation must first seek leave to do so by filing a motion with the Special Master and distributing copies of the motion to each of the attorneys on the Distribution List for the Distribution of Documents. The parties may file objections to such a motion.

(7) Posting of Docket and Case Management Orders. The Special Master will post on the internet, for public access, the docket sheets, all of his orders, and selected other documents. The address for access to these documents is:

http://www.law.gwu.edu/facweb/gmaggs/128orig/docket.htm

Dated: November 6, 2000

/s/

Gregory E. Maggs
Special Master
George Washington University
Law School
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APPENDIX

Article 7 of the International Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1607, T.I.A.S. No. 5639, provides:

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi- circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

(11)

No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

MEMORANDUM FOR THE UNITED STATES

SETH P. WAXMAN
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In the Supreme Court of the United States

No. 128, ORIGINAL

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

MEMORANDUM FOR THE UNITED STATES

On November 24, 1999, the State of Alaska invoked this Court's original jurisdiction to initiate an action against the United States under the Quiet Title Act of 1972, 28 U.S.C. 2409a. Alaska sought leave to file a bill of complaint asserting title to marine submerged lands in the vicinity of the Alexander Archipelago in southeastern Alaska. The United States did not oppose Alaska's motion, and, on June 12, 2000, this Court granted Alaska leave to file its complaint. See *Alaska* v. *United States*, 120 S. Ct. 2681. The United States filed its answer on August 25, 2000, and this Court thereafter referred the matter to a Special Master. See *Alaska* v. *United States*, 121 S. Ct. 337 (2000).

Alaska has since moved for leave to file an amended complaint. The amended complaint would renumber the original three counts and add a new count, now numbered Count II. Count II alleges that Alaska is

entitled to submerged lands within the Alexander Archipelago based on principles for defining juridical bays. See Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606, T.I.A.S. No. 5639. Because Alaska has requested permission to modify its pleading early in the proceedings before the Special Master and does not seek to enlarge the geographic scope of the submerged lands at issue, the United States does not oppose Alaska's motion for leave to file an amended complaint. In the interest of expedition, if the Court grants Alaska's motion, the United States will file an amended answer, and provide copies to the Special Master, within 30 days of the Court's order.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DECEMBER 2000

(12)

No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

ANSWER TO AMENDED COMPLAINT

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In the Supreme Court of the United States

No. 128, ORIGINAL

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

ANSWER TO AMENDED COMPLAINT

The United States of America, by its Acting Solicitor General, for its Answer to plaintiff State of Alaska's Amended Complaint to Quiet Title, admits, denies, and alleges as follows:

1. The allegations of paragraph 1 of the Amended Complaint are admitted, subject to the affirmative averment that numerous areas of tide and submerged lands, within the bounds described in paragraph 1 of the Complaint, are retained by the United States for purposes other than inclusion as part of the Tongass National Forest or Glacier Bay National Park and Preserve, and the title to such areas is not at issue in this proceeding.

2. The allegations of paragraph 2 of the Amended Complaint are admitted.

3. The first sentence of paragraph 3 of the Amended Complaint is a legal conclusion for which no response is required. The allegations contained in the second sentence of paragraph 3 are admitted, subject to the affirmative averment that numerous withdrawals, res-

ervations, and other federal appropriations, which may include tide and submerged lands and lie within the boundaries described in paragraph 1, were not the subject of any notice of intent to sue. Title to those areas is not at issue in this litigation.

Count I: Historic Waters of the Alexander Archipelago

4. Paragraph 4 of the Amended Complaint is a conclusion of law for which no response is required.

5. The allegations of paragraph 5 of the Amended Complaint are admitted.

6. Paragraph 6 of the Amended Complaint is a conclusion of law for which no response is required.

7. The allegations of the first sentence of paragraph 7 of the Amended Complaint are denied. With respect to the allegations in the second sentence of paragraph 7, the United States admits that Exhibit 1 to Alaska's Amended Complaint presents a general depiction of certain areas at issue here.

8. The allegations of paragraph 8 of the Amended Complaint are denied.

9. The allegations of paragraph 9 of the Amended Complaint are denied.

10. The allegations of paragraph 10 of the Amended Complaint are denied.

11. Paragraph 11 of the Amended Complaint is a conclusion of law for which no response is required.

12. Section 6(m) of the Alaska Statehood Act speaks for itself and no other response to the allegation contained in paragraph 12 of the Amended Complaint is required.

13. Paragraph 13 of the Amended Complaint is a conclusion of law for which no response is required.

14. The allegations contained in the first sentence of paragraph 14 of the Amended Complaint are admitted, except that the United States has insufficient knowledge upon which to form a belief as to the truth of the allegations that the United States drew the closing lines described in that sentence. With respect to the second sentence of paragraph 14, the United States admits only that the areas at issue are generally depicted in Exhibit 1 to Alaska's submission.

15. The allegations of paragraph 15 of the Amended Complaint are denied.

16. The allegations of paragraph 16 of the Amended Complaint are admitted.

17. The allegations of paragraph 17 of the Amended Complaint are admitted.

18. The allegations of paragraph 18 of the Amended Complaint are admitted.

19. The allegations of paragraph 19 of the Amended Complaint are admitted.

20. The allegations of paragraph 20 of the Amended Complaint are denied.

21. The allegations of paragraph 21 of the Amended Complaint are denied. Alaska has no title to the described submerged lands. The United States acknowledges that Alaska's *claim of title* is adverse to and is clouded by the title of the United States.

22. The allegations of paragraph 22 of the Amended Complaint are denied.

Count II: The Juridical Bay Status of the Waters of the Alexander Archipelago

23. The allegations of paragraphs 1-6, 11-13, and 16-19 of the Amended Complaint are responded to as set out above.

24. The allegations of paragraph 24 of the Amended Complaint are admitted.

25. The allegations of paragraph 25 of the Amended Complaint are denied.

26. The allegations of paragraph 26 of the Amended Complaint are denied.

27. The allegations of paragraph 27 of the Amended Complaint are denied.

28. The allegations of paragraph 28 of the Amended Complaint are denied.

29. The allegations of paragraph 29 of the Amended Complaint are denied.

30. With respect to the allegations of paragraph 30 of the Amended Complaint, the United States admits only that in measuring the area of indentation for purposes of applying the semicircle test, certain islands may be treated as part of the water area. The United States denies that the waters referred to are bays and denies the allegations of the final sentence of paragraph 30.

31. With respect to the allegations of paragraph 31 of the Amended Complaint, the United States admits that each of the areas described as a "bay" appears to contain minor water bodies which meet the requirements for inland water status. The United States denies that the entire water areas claimed by the State of Alaska, and depicted on Exhibit 2, are juridical bays. The United States further denies that any overlarge juridical bay exists in the area in dispute so as to justify the construction of 24 mile fall-back closing lines. The United States denies the allegations in the final sentence of paragraph 31.

32. The allegations of paragraph 32 of the Amended Complaint are denied.

33. The allegations of paragraph 33 of the Amended Complaint are denied.

34. The allegations of paragraph 34 of the Amended Complaint are denied.

35. The allegations of paragraph 35 of the Amended Complaint are denied.

36. With respect to the allegations of paragraph 36 of the Amended Complaint, the United States admits that each of the areas described as a "bay" appears to contain minor water bodies which meet the requirements for inland water status. The United States denies that the entire water area described by the State of Alaska as "South Southeast" is a juridical bay or combination of juridical bays.

37. With respect to the allegations of paragraph 37 of the Amended Complaint, the United States admits that it claims interests in submerged lands on both sides of the lines described in that paragraph. The United States denies that the lines described closed water areas which qualify as juridical bays.

38. The allegations of paragraph 38 of the Amended Complaint are denied.

39. The allegations of the first sentence of paragraph 39 of the Amended Complaint are admitted, except, the United States has insufficient information upon which to base a response to the allegation that the submerged lands extending three miles seaward of the alleged closing line of Cordova Bay are within the outer boundaries of the Tongass National Forest. The allegations of the second sentence of paragraph 39 are denied.

40. The allegations of paragraph 40 of the Amended Complaint are denied. Alaska has no title to the described submerged lands. The United States acknowl-

edges that Alaska's claim of title is adverse to and is clouded by the title of the United States.

41. The allegations of paragraph 41 of the Amended Complaint are denied.

Count III: The Tongass National Forest

42. The allegations of paragraphs 1-6, 11-13 and 16-19 of the Amended Complaint are responded to as set out above.

43. The allegations of paragraph 43 of the Amended Complaint are denied.

44. The allegations of paragraph 44 of the Amended Complaint are denied.

45. The allegations of paragraph 45 of the Amended Complaint are denied.

46. With respect to paragraph 46 of the Amended Complaint, the United States admits that it claims an interest in the tidelands and submerged lands within the boundaries of the Tongass National Forest and that that interest is disputed by Alaska. The United States denies that Alaska holds title to such lands.

47. The allegations of paragraph 47 of the Amended Complaint are denied.

Count IV: Glacier Bay National Monument

48. The allegations of paragraphs 1-6 and 11-13 of the Amended Complaint are responded to as set out above.

49. With respect to the allegations of paragraph 49 of the Amended Complaint, the United States admits only that the Antiquities Act was one authority for the withdrawal of Glacier Bay National Monument.

50. The 1925 Executive order speaks for itself and no further response is required.

51. Paragraph 51 of the Amended Complaint is a conclusion of law for which no response is required.

52. With respect to the allegations of paragraph 52 of the Amended Complaint, the United States admits only that one of the purposes of the 1925 creation of Glacier Bay National Monument was to preserve the land left bare by the retreat of tidewater glaciers for study of the development of flora and fauna.

53. The allegations of paragraph 53 of the Amended Complaint are denied.

54. The allegations of paragraph 54 of the Amended Complaint are denied.

55. The allegations of paragraph 55 of the Amended Complaint are admitted.

56. The allegations of paragraph 56 of the Amended Complaint are admitted.

57. With respect to the allegations contained in paragraph 57 of the Amended Complaint, the United States admits only that two of the purposes of the 1939 expansion of Glacier Bay National Monument were to set aside a refuge for brown bears and to preserve the coastal forest.

58. The allegations of paragraph 58 of the Amended Complaint are denied.

59. The allegations of paragraph 59 of the Amended Complaint are denied.

60. The allegations of paragraph 60 of the Amended Complaint are denied.

61. The allegations of paragraph 61 of the Amended Complaint are denied.

62. The allegations of paragraph 62 of the Amended Complaint are denied, except that the United States admits that its title is disputed by Alaska.

63. The allegations of paragraph 63 of the Amended Complaint are denied.

Prayer For Relief

WHEREFORE, the United States prays for the following relief:

A. That judgment be entered quieting title of the United States in and to the subject lands and declaring that the State of Alaska has no right, title, or interest in or to said lands and that the State of Alaska be forever barred from asserting any claim whatsoever in the subject lands or any part thereof adverse to the United States.

B. That said judgment enjoin the State of Alaska, its privies, assigns, lessees, and other persons claiming under it from interfering with the rights of the United States in said lands.

C. For such further relief as this Court may deem just and proper.

Respectfully submitted.

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FEBRUARY 2001

(18)

Supreme Court, U.S.
FILED
FEB 22 2001
OFFICE OF THE CLERK

No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

The proposed Intervenor Defendants Franklin H. James, Shakan Kwaan Thling-Git Nation, Joseph K. Samuel and Taanta Kwaan Thling-Git Nation (collectively, the "Proposed Intervenors") by their attorneys ask leave of this Court to intervene as party Defendants in the above-captioned matter and to file the Proposed Answer of Intervention attached hereto as Appendix A. As is more fully set forth in the accompanying Brief in Support of Motion for Leave to Intervene and File Answer attached as Appendix B, the Proposed Intervenors state as follows:

1. The Proposed Intervenors have a direct and substantial interest in the question of ownership of the submerged lands within the boundaries of the Tongass National Forest.

2. Disposition of this action without the Proposed Intervenors will, as a practical matter, impair or impede the ability of the Proposed Intervenors to protect their interests which are not adequately represented by the other parties to this litigation.

3. The Proposed Intervenors' defense that there is federal ownership of the submerged lands in the Tongass National Forest area has questions of fact and law in common with those raised in this litigation. Intervention will not delay or prejudice the adjudication of the rights of the original parties.

4. For the foregoing reasons, the motion for leave to intervene as party Defendants in this matter should be granted.

Dated: February 20, 2001

Respectfully submitted,

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Appendix A

In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AND

FRANKLIN H. JAMES, SHAKAN KWAAN THLING-GIT NATION, JOSEPH K. SAMUEL, AND TAANTA KWAAN THLING-GIT NATION, INTERVENOR DEFENDANTS

PROPOSED ANSWER OF INTERVENTION

Intervenors, for their Answer to Plaintiff State of Alaska's Amended Complaint to Quiet Title, admit, deny and allege as follows:

Count I – Historic Waters of the Alexander Archipelago

1. The allegations of paragraph 1 of the Amended Complaint are admitted.

2. The allegations of paragraph 2 of the Amended Complaint are admitted.

3. Intervenors are without sufficient information to admit or deny the allegations contained in paragraph 3 of the Amended Complaint.

Count II – The Juridical Bay Status of the Waters of the Alexander Archipelago

4. Paragraph 4 of the Amended Complaint is a conclusion of law for which no response is required.

5. The allegations of paragraph 5 of the Amended Complaint are admitted.

6. Paragraph 6 of the Amended Complaint is a conclusion of law for which no response is required.

7. Intervenors are without sufficient information to admit or deny the allegations of paragraph 7 of the Amended Complaint.

8. The allegations of paragraph 9 of the Amended Complaint are denied.

9. The allegations of paragraph 10 of the Amended Complaint are denied.

10. Paragraph 11 of the Amended Complaint is a conclusion of law for which no response is required.

11. Section 6(m) of the Alaska Statehood Act speaks for itself and no other response to the allegations contained in paragraph 12 of the Amended Complaint is required.

12. Paragraph 13 of the Amended Complaint is a conclusion of law for which no response is required.

13. Intervenors are without sufficient information upon which to admit or deny the allegations contained in paragraph 14 of the Amended Complaint.

14. The allegations of paragraph 15 of the Amended Complaint are denied.

15. The allegations of paragraph 16 of the Amended Complaint are admitted.

16. The allegations of paragraph 17 of the Amended Complaint are admitted.

17. The allegations of paragraph 18 of the Amended Complaint are admitted.

18. Intervenors make no Answer to the allegations contained in paragraph 19 of the Amended Complaint because they do not address subject matter in which Intervenors have an interest.

19. The allegations of paragraph 20 of the Amended Complaint are denied.

20. The allegations of paragraph 21 of the Amended Complaint are denied.

21. The allegations of paragraph 22 of the Amended Complaint are denied.

22. Intervenors make no answer to the allegations contained in paragraphs 23 through 41 of the Amended Complaint because they do not address subject matter in which Intervenors have an interest.

Count III – The Tongass National Forest

23. The allegations of paragraphs 1-6, 11-13 and 16-19 of the Amended Complaint are responded to as set forth above.

24. The allegations of paragraph 43 of the Amended Complaint are denied.

25. The allegations of paragraph 44 of the Amended Complaint are denied.

26. The allegations of paragraph 45 of the Amended Complaint are denied.

27. Intervenors deny that the State of Alaska holds title to these lands. For the remainder of the allegations, Intervenors are without sufficient information to admit or deny the allegations contained in the remainder of paragraph 46 of the Amended Complaint.

28. The allegations of paragraph 47 of the Amended Complaint are denied.

Count IV – Glacier Bay National Monument

29. Intervenors make no Answer to the allegations contained in paragraphs 48 through 63 of the Amended Complaint because they do not address subject matter in which Intervenors have an interest.

PRAYER FOR RELIEF

WHEREFORE, the Proposed Intervenors pray for the following relief:

A. That the Court enter a judgment quieting title of the United States in and to the subject land of the Tongass National Forest and declaring that the State of Alaska has no right, title or interest in or to said lands and that the State of Alaska be forever barred from asserting any claim whatsoever in the subject lands.

B. That said judgment enjoin the State of Alaska, its privies, assigns, lessees, and other persons claiming under it from interfering with the rights of the United States in said lands.

C. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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Appendix B

In the Supreme Court of the United States

No. 128, Original

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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Franklin H. James, Shakan Kwaan Thling-Git Nation ("Shakan Kwaan"), Joseph K. Samuel and Taanta Kwaan Thling-Git Nation ("Taanta Kwaan") (collectively "Proposed Intervenors") hereby move the Court for an order permitting them to intervene as party Defendants in this matter, and permitting their proposed Answer of Intervention to be filed as the Answer of Intervention. The grounds of this motion are set forth below.

BACKGROUND

The Proposed Intervenor Defendant Franklin H. James is the First Chairholder and Tribal Spokesman for Shakan Kwaan. Shakan Kwaan is a band of Thling-Git natives whose ancestral homeland is in southeast Alaska, and more particularly in and around the northwest part of Prince of Wales Island. The membership of the Shakan Kwaan is determined by Thling-Git blood and marriage relationships; and thus the Proposed Intervenor Shakan Kwaan is both a community and an extended family as those terms are defined and/or used in the United States' subsistence regulations set forth in 50 C.F.R. Part 100. Insofar as the subject matter of this lawsuit is concerned, all members of the Shakan Kwaan who are involved in the subject matter of this lawsuit and who have authorized Proposed Intervenor James to represent them in this matter are rural Alaskan residents, as well as being citizens of the United States and federally recognized Alaskan natives.

Proposed Intervenor Defendant Joseph K. Samuel is the First Chairholder and Tribal Spokesman for the Taanta Kwaan. Taanta Kwaan is a band of Thling-Git natives whose ancestral homeland in southeast Alaska and more particularly in and around Prince of Wales Island, neighboring the homeland of Intervenor Shakan Kwaan. The membership of the Taanta Kwaan is determined by Thling-Git blood and marriage relationships; and thus the Proposed Intervenor Taanta Kwaan is both a "community"

and an extended "family" as those terms are defined and/or used in the federal subsistence regulations set forth in 50 C.F.R. Part 100. Insofar as the subject matter of this lawsuit is concerned, all members of the Taanta Kwaan who are involved and who have authorized Proposed Intervenor Samuel to represent them in this matter are rural Alaskan residents as well as being citizens of the United States and federally recognized Alaskan natives.

Since time immemorial, the Proposed Intervenors and their ancestors have made customary and traditional use of herring roe on kelp in the marine waters of the Tongass National Forest, within the meaning of the Alaskan National Interest Lands Conservation Act ("ANILCA") and 50 C.F.R. § 100.4. In or about 1991, based on the United States' failure to act lawfully and with reasonable timeliness on the Proposed Intervenors' application to issue permits for the harvesting and selling of herring row on kelp, as lawful "customary trade" under the terms of ANILCA, the Proposed Intervenors filed a civil action in the United States District Court for the District of Alaska seeking declaratory and injunctive relief against several federal agencies. *See Lincoln Peratrovich v. United States of* America, No. A92-0734-CV (D. Alaska). In particular, the lawsuit addressed the United States' disclaimer of federal regulatory jurisdiction over the marine waters of the Tongass National Forest.

In the approximately nine (9) years after filing the Complaint, the Proposed Intervenors repeatedly argued that the United States, not the State of Alaska, holds title to all fast and submerged lands within the boundaries of the Tongass National Forest; and that because such federally owned lands are "federal public lands," ANILCA subsistence fishing rights clearly apply to them. Conversely, the United States argued during the proceedings that title had not been shown to have been reserved by the United States to

the submerged lands within the exterior boundaries of the Tongass National Forest. *See Peratrovich,* Response to Motion for Preliminary Injunction, 20-23, No. A92-0734-CV (D. Alaska), filed on or about December 23, 1992, relevant pages attached hereto as Exhibit A.

In this original jurisdiction case, the State of Alaska seeks to establish title to submerged lands within its borders, including, the same submerged lands within the boundaries of the Tongass National Forest at issue in the Proposed Intervenors' federal district court case. On August 17, 2000, after this Court granted Alaska's motion for leave to file its complaint in this matter, the District Court stayed the Proposed Intervenors' case because "it would not be good use of resources for this Court to undertake to resolve an issue which will be resolved by the United States Supreme Court in a fashion which will be controlling for purposes of this and other cases." *See Peratrovich*, Order Status Conference, No. A92-074-CV (D. Alaska) filed on or about August 18, 2000, attached hereto as Exhibit B. The district court's stay effectively bars the Proposed Intervenor's ability to participate meaningfully in the adjudication of land title issues that will have a direct and permanent impact on their subsistence rights. If the State of Alaska is successful in this case, the Proposed Intervenors' litigation in the District of Alaska will fail and they will effectively lose federal subsistence rights in this area.

Given their interest, the threat to that interest and the inability of the Respondent United States to represent or defend that interest, the Proposed Intervenors respectfully request that they be permitted to intervene in the proceedings as a full party.

ARGUMENT

Whether a third person may intervene in an original action in the U.S. Supreme Court is guided by the Federal

Rules of Civil Procedure. *See Arizona v. California*, 460 U.S. 605 (1983). Rule 24 Fed. R. Civ. P., authorizes intervention in certain cases as a matter of right and in other cases as a permissive matter. Intervention should be granted in this case as a matter of right because the Proposed Intervenors would be bound by the judgment to be entered in this matter and the representation of the Proposed Intervenors' interests by the existing parties may be inadequate. Further, the claims and defenses of the Proposed Intervenors and those of the United States, a party to the main proceedings herein, have questions of law and fact in common and no party would be prejudiced by the intervention.

I. THE PROPOSED INTERVENORS ARE ENTITLED TO INTERVENTION AS A MATTER OF RIGHT.

Intervention as a matter of right is appropriate in this case. The rule guiding intervention as a matter of right provides that upon timely application, anyone shall be permitted to intervene "when the applicant claims an interest relating to the property…which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

The Proposed Intervenors' motion for leave to intervene is sufficiently timely with respect to this case of original jurisdiction given that the only briefing that has taken place thus far is the motion for leave to file the bill of complaint. Intervention will not interfere with the schedule for the proceedings previously established in this matter.

The lack of "adequate representation" condition is satisfied if the Proposed Intervenors can show that the representation of their interests by the current party "may be"

inadequate. *See Sierra Club, et al. v. Robinson, et al.*, 960 F.2d 83, 86 (8th Cir. 1992). The burden for making this showing is generally a minimal one. *See id.* The Proposed Intervenors believe it necessary to be involved in all hearings on the merits in this matter in order to adequately ensure that federal ownership of the Tongass National Forest area is strongly asserted. While it may be presumed that the United States has the same interest in asserting ownership of these lands, the United States has previously not taken a strong position in regard to this issue as reflected by the position taken by the United States in the Proposed Intervenors' litigation in the District of Alaska, where it actually disclaimed regulatory jurisdiction over submerged lands in the Tongass National Forest. Further, the Proposed Intervenors' interests include the obligations they have with regard to the economic and social well-being of their members. The federal government, although in a trust relationship with Alaskan natives, cannot ensure adequate representation sufficient to guarantee the Proposed Intervenors the level of advocacy their members demand.

Finally, there can be no doubt that the Proposed Intervenors have a recognized interest in the subject matter of the litigation. The submerged lands to which the Proposed Intervenors are seeking declaration of their subsistence rights in the federal district court are directly at issue in the present matter. The Proposed Intervenors' interests in the submerged lands of southeastern Alaska have been and will continue to be determined in this litigation since the United States' action as a representative will bind the Alaskan natives to any judgment. *See Heckman v. U.S.*, 224 U.S. 413, 444-45 (1912). Moreover, the Proposed Intervenors are entitled "'to take their place as independent qualified members of the modern body-politic.'" *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968) (quoting *Board of County Comm'rs v. Seeber*, 318 U.S. 705, 715 (1943)); *Arizona v. California*, 460 U.S. 605. Accordingly, similar to

the Indian tribes in *Arizona v. California*, the Proposed Intervenors' participation in the current litigation which concerns matters critical to their welfare, should not be denied. Any argument by the State of Alaska or the U.S. to the contrary is misplaced. *Id.* The Proposed Intervenors' claims in the federal district court have been stayed on account of this very matter. If they cannot litigate their interests here, they will be unable to assert their rights in any court.

For these reasons, the Proposed Intervenors should be allowed to intervene as of right.

II. AT A MINIMUM, THE PROPOSED INTERVENORS SHOULD BE GRANTED PERMISSIVE INTERVENTION UNDER RULE 24(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Proposed Intervenors, at a minimum, satisfy the standards for permissive intervention set forth in the federal rules. In the event intervention is not available as a matter of right under Federal Rule of Civil Procedure 24(a), the Court may, in the exercise of its discretion, allow intervention under Rule 24(b). In order to satisfy the requirements of permissive intervention under Rule 24(b)(2), the motion: (1) must be timely; (2) the "claim or defense in the main action must have a question of law or fact in common"; and (3) intervention must not "unduly delay or prejudice the adjudication of the rights of the original parties." *See Arrow v. Gambler Supply Inc.*, 55 F.3d 407, 410 (8th Cir. 1995).

For the reasons previously stated, the Proposed Intervenors' motion is timely. The litigation has not progressed beyond the preliminary stages and, as such, it is difficult to envision that intervention would unduly delay or prejudice the parties. The issue in this litigation is ownership of submerged lands and that question directly controls the

Proposed Intervenors' subsistence rights under federal law, so the common questions of law or fact the Proposed Intervenor wish to present in defense of federal ownership justifies permissive intervention.

Neither the State of Alaska nor the United States can present any precise reason why their interests would be prejudiced or this litigation unduly delayed by the Proposed Intervenors' presence. Here, the Proposed Intervenors do not seek to bring new claims or issues against the state or the federal government, but only ask leave to participate in the question of ownership of specific submerged lands which affect their subsistence rights in a case of original jurisdiction commenced by the State of Alaska. Hence, the Supreme Court's judicial power over the controversy is not enlarged by granting leave to intervene, and the state's sovereign immunity protected by the Eleventh Amendment is not compromised. *See, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981); *Poafpybitty*, 390 U.S. 365. Having satisfied the requirements for permissive intervention, at a minimum, the Proposed Intervenors' Motion for Leave to Intervene should be granted.

CONCLUSION

Rule 24 intervention is intended to ensure that litigation proceeds with all parties who have a legally recognizable stake in the outcome. For all the reasons set forth in this brief, the Proposed Intervenors respectfully request that they be granted leave to intervene in this case.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

LINCOLN PERATROVICH, et al.,	)	
	)	
Plaintiffs,	)	No. A92-
vs.	)	734 Civil (HRH)
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

Status Conference

A status conference was held in this case on August 17, 2000.

The court discussed with all counsel the status of this case in light of the fact that the United States Supreme Court has taken jurisdiction of a case known as Alaska v. United States, No. 128 Orig., 2000 WL 743716 (U.S. June 12, 2000). It is the perception of the court, and counsel do not disagree, that Original No. 128 raises what is probably the fundamental issue raised in this case. It is the court's view and counsel do not disagree, that it would not be a good use of resources for this court to undertake to resolve an issue which will be resolved by the United States Supreme Court in a fashion which will be controlling for purposes of this and other cases.

In light of the foregoing, this case shall remain stayed pending a decision by the United States Supreme Court in Original

No. 128 or until a party shall convince the court that there is a good cause to proceed with this matter, whichever shall occur earlier.

DATED at Anchorage, Alaska, this 17 day of August, 2000.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LINCOLN PERATROVICH, rural Alaska resident & spokesman for Shakan Kwaan; et. al., Plaintiffs, v. UNITED STATES OF AMERICA, FEDERAL SUBSISTENCE BOARD, et. al., Defendants.	) No. A92-734 Civil

RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

* * *

C. Title Has Not Been Shown To Have Been Reserved By The United States. Plaintiffs contend that the creation of the Tongass National Forest constituted a reservation of title by the United States to any submerged lands within the exterior boundaries of that reservation. Pltfs' Memo at 5-10. The Supreme Court in Utah Division of State Lands v. United States, 482 U.S. 193 (1987), has addressed the standard to be applied in determining whether a reservation of title has been effected. Plaintiffs have

clearly failed to carry their burden of showing that title to the submerged lands at issue was reserved at the time of statehood. Plaintiffs have thus failed to show a likelihood of prevailing on the merits of this claim. This is especially so when the Department of Agriculture has previously been affirmed in its contention that tidelands within the Tongass National Forest were not public lands for purposes of Section 810 of ANICLA. City of Angoon v. Hodel, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986), aff'g, City of Angoon v. Hodel, No. A83-234 Civil (D. Alaska, Memorandum and Order on Subsistence and Trust Responsibility Issues filed Oct. 17, 1985) at 14-16.[5]

As indicated in Utah Division of State Lands, title to the lands under navigable waters is generally held in trust for the respective future states. Id. at 196-97. The United States may, however, prior to statehood convey that title to a third party or reserve it to itself. Id. at 197, 200-02.[6] The issue is one of intent which is not to be lightly inferred. Id. at 197, 201-02. As stated by the Court:

> Congress, therefore, will defeat a future State's entitlement to land under navigable waters only in "exceptional circumstances," and in light of this policy, whether faced with a reservation or a conveyance, we simply cannot infer that Congress intended to defeat a future State's title to land under navigable waters "unless the intention was definitely

---

[5] A copy of this court's unreported decision is attached as Exhibit No. 2 hereto.

[6] Technically, the court only assumed without finally deciding that the United States could reserve title to itself. 482 U.S. at 201.

declared or otherwise made very plain." (Emphasis added).

Id. The necessary intent to defeat a state's entitlement will not be inferred from the "mere act of reservation itself." Id. at 202. In order for title to be found to have remained in the United States:

> [T]he United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land. (Emphasis added).

Id.

Plaintiffs have shown nothing more than the acts of creating the Tongass National Forest. The authorization set forth in Section 24 of the Act of March 21, 1891, ch. 561, 26 Stat. 1095, 1103, quoted in Pltfs' Memo at 6, only authorizes the President to "declare the establishment of such reservations and the limits thereof." There is no indication in the legislative language of the necessary affirmative intent by Congress that any action by the President under that statute was "affirmatively intended to defeat" any future state's title to submerged lands. Nor is that intent shown in the proclamations of President Roosevelt referenced in Pltfs' Memo at 7-9. While the President clearly intended to create the forest reserve, there is no showing in those proclamations that these reserves were intended to defeat the title of the future State of Alaska to submerged lands at issue.

Plaintiffs' reliance on Section 4 (Plfs' Memo at 6) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, note prec. 48 U.S.C. § 21, is also misplaced. In Section 4, the State of Alaska only agrees not to claim title to lands "not granted or confirmed to the State or its political subdivisions by or under the authority of this act. . . " Section 6(m) of the Statehood Act provides, however, that "[t]he Submerged Lands Act of 1953. . . shall be applicable to the State of Alaska and the said State shall have the same rights as do the existing States thereunder." 72 Stat. At 343. Under the Submerged Lands Act, 43 U.S.C. § 1311(a), "title to and ownership of the lands beneath navigable waters. . . are hereby vested in and assigned to the respective States. . . " Therefore, Section 4 of the Statehood Act does not operate as a disclaimer by the State of title to submerged lands.

For the foregoing reasons, plaintiffs have failed to show likelihood of success on the merits of their claim that title to the submerged lands within the Tongass National Forest was reserved to the United States at the time of statehood.

* * *

Supreme Court, U.S.
FILED
APR 4 2001

(6)

No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

No. 128, ORIGINAL

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

BRIEF FOR THE UNITED STATES IN OPPOSITION

STATEMENT

On November 24, 1999, the State of Alaska invoked this Court's original jurisdiction to initiate an action against the United States under the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(b)(2). Alaska sought leave to file a bill of complaint asserting title to marine submerged lands in the vicinity of the Alexander Archipelago in southeastern Alaska. The submerged lands in question lie, for the most part, within the current exterior boundaries of the Tongass National Forest and the Glacier Bay National Park and Preserve. The United States did not oppose Alaska's motion, and, on June 12, 2000, this Court granted Alaska leave to file its complaint. The United States

filed its answer on August 25, 2000, and the matter was referred to Special Master Gregory Maggs. On December 14, 2000, Alaska sought leave to file an amended complaint. The United States did not oppose Alaska's motion, and, on January 8, 2001, this Court granted leave to file the amended complaint.

On February 26, 2001, Franklin H. James, Shakan Kwaan Thling-Git Nation (Shakan Kwaan), Joseph K. Samuel, and Taanta Kwaan Thling-Git Nation (Taanta Kwaan) (collectively movants) sought leave to file a motion to intervene and answer. James and Samuel allege that they are the First Chairholders and Tribal Spokesmen for Shakan Kwaan and Taanta Kwaan, respectively. Movants allege that Shakan Kwaan and Taanta Kwaan are bands of Thling-Git natives whose ancestral homeland is in southeastern Alaska. Neither Shakan Kwaan nor Taanta Kwaan is a recognized tribe having a government-to-government relationship with the United States. See 65 Fed. Reg. 13,298 (2000) (listing federally recognized tribes).

Movants claim no property rights to the submerged lands at issue in the quiet title action. Rather, they allege that, if submerged lands within the exterior boundaries of the Tongass National Forest belong to the United States, they would be entitled to engage in what they allege are subsistence uses of those submerged lands in accordance with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3111 *et seq.*

Title VIII of ANILCA provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. ANILCA defines subsistence uses as "the customary and traditional uses by rural Alaska

residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; * * * for barter, or sharing for personal or family consumption; and for customary trade." 16 U.S.C. 3113. Thus, the beneficiaries of the priority are rural residents of Alaska, rather than the members of a specific tribe or organization.

Movants are among a group of plaintiffs that have previously asserted subsistence rights under ANILCA in the United States District Court for the District of Alaska. Shakan Kwaan, Taanta Kwaan, and others filed a complaint for injunctive and declaratory relief against, among others, the United States and the Federal Subsistence Board for refusing to consider and act upon their applications for the subsistence taking of herring roe on kelp. See *Peratrovich* v. *United States*, No. A92-734-CV (D. Alaska filed Dec. 2, 1992) (Complaint). In their complaint, they alleged that the United States, and not the State of Alaska, holds title to all submerged lands within the Tongass National Forest, making ANILCA and its subsistence use priority applicable to those submerged lands. The plaintiffs in *Peratrovich* also alleged in their complaint that their taking of herring roe was for the purpose of "customary trade," a subsistence use allowed by ANILCA, 16 U.S.C. 3113.

The *Peratrovich* plaintiffs filed a motion for preliminary injunction seeking to require the federal defendants in that case to issue certain subsistence fishing permits. Mot. for Prelim. Inj., *Peratrovich* v. *United States*, *supra*. The United States opposed the motion, arguing that plaintiffs had failed: (1) to carry their burden of showing that the United States had title to the submerged lands in question; (2) to show that the

use for which they sought the permits was a subsistence use; (3) to show that the Federal Subsistence Board acted unlawfully; and (4) to prove irreparable injury justifying an injunction. Response to Mot. for Prelim. Inj. at 20-27, *Peratrovich* v. *United States*, *supra*. On August 17, 2000, the United States District Court stayed the *Peratrovich* litigation pending a decision by this Court in the present case.

Movants claim they are entitled to intervene in the present case as a matter of right under Federal Rule of Civil Procedure 24(a) because they allegedly have a recognized interest in the subject matter of this litigation and will not be adequately represented by the United States. If they are not permitted to intervene as a matter of right, they ask in the alternative to be granted permissive intervention under Federal Rule of Civil Procedure 24(b).

ARGUMENT

THE MOVANTS' REQUEST FOR LEAVE TO INTERVENE SHOULD BE DENIED

This Court allows private parties and organizations to intervene in cases arising under its original jurisdiction only in compelling circumstances. Those circumstances are not present here. The State of Alaska filed this quiet title action against the United States to resolve a dispute between sovereigns over ownership of submerged lands. Movants do not claim any right of ownership; they simply assert that, if the United States owns the disputed acreage, they will be entitled to obtain permits to harvest herring roe on some of the submerged lands. Movants' interest in this litigation is indistinguishable from that of countless other persons who do not claim to own, but may wish to use, public lands. They do not have a sufficient stake in this inter-

governmental quiet title action to participate as parties. The motion for leave to intervene should therefore be denied.

A. Private Parties And Organizations May Intervene In Original Actions Only In Compelling Circumstances

Movants claim that they are entitled to intervene in this original action as a matter of right, or permissively, under Federal Rule of Civil Procedure 24. They are mistaken. The Federal Rules of Civil Procedure, by their own terms, govern procedure only "in the United States district courts." Fed. R. Civ. P. 1. When adjudicating original actions, this Court follows the Federal Rules of Civil Procedure as to the "form of pleadings and motions," but in other respects, the Federal Rules may only be "taken as guides." Sup. Ct. R. 17.2. See *Arizona* v. *California*, 460 U.S. 605, 614 (1983) (The Court's "own Rules make clear that the Federal Rules are only a guide to procedures in an original action."). Furthermore, the "Federal Rules are a guide to the conduct of original actions in this Court only 'where their application is appropriate.'" *Utah* v. *United States*, 394 U.S. 89, 95 (1969) (quoting Sup. Ct. R. 9(2), as then in force). This Court has made clear that, contrary to the practice in district courts, private entities may intervene in original actions only upon a showing of compelling need for their participation as parties.

The Framers of the Constitution assigned to this Court original jurisdiction over a limited class of intersovereign disputes. U.S. Const. Art. III, § 2; see 28 U.S.C. 1251(a) and (b)(2). The Court has repeatedly emphasized that this "delicate and grave" responsibility should be exercised "sparingly." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Louisiana* v.

Texas, 176 U.S. 1, 15 (1900) and *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992)). See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 739 (1981); *Arizona* v. *New Mexico*, 425 U.S. 794, 796 (1976); *Utah*, 394 U.S. at 95. The Court has interpreted Article III and 28 U.S.C. 1251 as providing it "with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Mississippi* v. *Louisiana*, 506 U.S. at 76 (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

The Court has correspondingly given close scrutiny to intervention requests and has allowed private parties to intervene only upon a showing of compelling need. The Court identified the controlling principles in *New Jersey* v. *New York*, 345 U.S. 369 (1953), where the City of Philadelphia sought to intervene in a dispute between New Jersey, New York, and Pennsylvania over the use of the Delaware River and its tributaries. The Court denied Philadelphia's motion, noting that a State, "when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id.* at 372 (quoting *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930)). The Court stated:

> The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Id. at 373. The Court observed that Philadelphia's interest in the dispute was no different from that of individual citizens who might be interested in the outcome and that, if Philadelphia were allowed to

intervene, the case could be "expanded to the dimensions of ordinary class actions." *Ibid.* The Court stated:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state. See *Kentucky* v. *Indiana*, *supra*.

Ibid. Accord *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 97 (1972); see *Kentucky* v. *Indiana*, 281 U.S. at 173-174 ("An individual citizen may be made a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted.").

This Court has accordingly recognized that private individuals and organizations ordinarily "have no right to intervene in an original action." *United States* v. *Nevada*, 412 U.S. 534, 538 (1973). To the contrary, "[a] State is presumed to speak in the best interests of those citizens," and requests to intervene "may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a 'showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.'" *Nebraska* v. *Wyoming*, 515 U.S. 1, 21-22 (1995) (quoting *New Jersey* v. *New York*, 345 U.S. at 373). Although the Court originally identified those principles in the context of interstate disputes, they apply *a fortiori* to controversies between the United States and a State, where the same core sovereign interests are at stake. See *id.*

at 26 (Thomas, J., concurring in part and dissenting in part).

B. Movants Have Failed To Demonstrate An Adequate Interest Justifying Intervention

Alaska brought this action against the United States under the Quiet Title Act of 1972, 28 U.S.C. 2409a(a), which provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest.

It is obvious from the text of the QTA, and well established through judicial decision, that a party in a QTA action must claim an ownership interest in the property in dispute. See *Block* v. *North Dakota*, 461 U.S. 273, 276 (1983) (The QTA authorizes "civil actions to adjudicate title disputes involving real property in which the United States claims an interest."); see also, *e.g.*, *Long* v. *Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001) (The plaintiff could not assert a QTA claim because he "does not claim a property interest to which title may be quieted."); *Pai 'Ohana* v. *United States*, 875 F. Supp. 680, 693 (D. Haw. 1995) (The "word 'title' as used in 28 U.S.C. § 2409a connotes an ownership interest."), aff'd, 76 F.3d 280 (9th Cir. 1996); *Borough of Maywood* v. *United States*, 679 F. Supp. 413, 418 (D.N.J. 1988) (The Borough could not assert a QTA claim "since it has no right or title in the property."); *Claxton* v. *SBA*, 525 F. Supp. 777, 784 (S.D. Ga. 1981) (To "come within the class of beneficiaries envisioned by section 2409a" a party must "have *title or color of title to land* in which the United States also claims an interest.") (citation omitted);

Tudor v. *Members of Ark. State Parks, Recreation & Travel Comm'n*, 83 F.R.D. 165, 172 (E.D. Ark. 1979) ("The legislative history of § 2409a [H.R. Rep. No. 1559, 92d Cong., 2d Sess. 10 (1972)] convinces us that Congress intended to limit the scope* * * to those parties who have title or color of title to land in which the United States also claims an interest.").

Movants do not claim any property interest in the marine submerged lands at issue. Rather, they claim that, if the United States has title to certain of the submerged lands at issue here, they would be entitled to seek permits, pursuant to ANILCA, to gather herring roe on kelp from those lands. See Mot. 5. That interest does not provide a sufficient basis for intervention in this original action. For present purposes, movants are no different from countless other entities, such as hunters, campers, hikers, logging companies, or even other asserted subsistence users, who may also be interested in the outcome of this litigation. Indeed, many of those other entities may actually have permits to make use of federal lands, something movants do not possess.

Like the City of Philadelphia in *New Jersey* v. *New York*, *supra*, the movants in this case lack an interest that is distinct from that of numerous other members of the population. Hence, if movants were allowed to intervene, the Court would find it difficult to deny intervention to a wide variety of other parties who may have an interest in whether the United States or the State of Alaska has title to some or all of the lands in question. The geographic scope of this title dispute is immense, embracing marine submerged lands throughout southeastern Alaska. The presence of private parties in this litigation, each with its own perspective of how particular public lands should be utilized, would

hamper efficient resolution of this inter-sovereign dispute. It would run the risk of expanding this case even beyond "the dimensions of ordinary class actions," 345 U.S. at 373, and "greatly increasing the complexity of this litigation," *Utah*, 394 U.S. at 95-96.

Movants contend (Mot. 5-6) that they are entitled to intervene on the basis of this Court's decision in *Arizona* v. *California*, *supra*, which allowed five Indian Tribes to intervene in an ongoing dispute over apportionment of the Colorado River. See 460 U.S. at 614-615. The intervenors in that case, however, had distinct interests that are clearly distinguishable from those of the movants here. The intervenors there were federally recognized Indian Tribes that each had a preexisting right under this Court's 1964 decree to a share of the water apportionment. See *Arizona* v. *California*, 376 U.S. 340, 343-345 (1964). The movants here, by contrast, are not federally recognized Indian Tribes and they have no claim to ownership of the submerged lands at issue in this case.

The movants instead assert interests basically similar to the interests that have been found insufficient to support intervention in other original actions. See *Arizona* v. *California*, 530 U.S. 392, 419 n.6 (2000) (noting that federal lessees who "do not own land in the disputed area" and make "no claim to title or water rights" were not entitled in intervene in an interstate water dispute) (internal quotation marks omitted); *Nebraska* v. *Wyoming*, 507 U.S. 584, 589-590 (1993) (noting that the Special Master recommended denial of motions of various water users to intervene in an interstate water dispute, and those parties did not file exceptions to the Master's recommendation). The movants fall far short of establishing an entitlement to intervene in this case.

CONCLUSION

For the foregoing reasons, the Court should deny the movants' motion for leave to intervene and file an answer.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

APRIL 2001

(7)

No. 128, Original

IN THE

Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Motion for Leave to Intervene

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OPPOSITION OF PLAINTIFF STATE OF ALASKA TO MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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IN THE

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

OPPOSITION OF PLAINTIFF STATE OF ALASKA TO MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

INTRODUCTION

Plaintiff State of Alaska opposes the motion for leave to intervene filed by Franklin H. James, *et al.* ("Movants"). This case, brought under the Court's original jurisdiction, is a quiet title action between two sovereigns—the State of Alaska and the United States—over the submerged lands underlying the marine areas in Southeast Alaska. No other person or entity claims an interest in title to these lands, and title is the only issue that will be adjudicated. Movants admit that they only wish to participate on the title question and do not seek to expand the issues in the case.[1] Movants' Brief in

[1] Movants are only interested in the question whether the United States defeated Alaska's title to the submerged lands underlying the marine waters within the boundaries of the Tongass National Forest. *See* Proposed Answer of Intervention at 4.

Support of Motion for Leave to Intervene and File Answer ("Brief in Support") at 7.

Movants, however, do not claim an ownership interest in these lands. Instead, by their own admission, they seek intervention solely to pursue their commercial interest in harvesting and selling herring roe on kelp from the waters of Southeast Alaska. *Id.* at 2. Movants assert an interest in the subject matter of this litigation merely because they have subsistence rights on federal public lands under the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified primarily at 16 U.S.C. §§ 3001-3233). Brief in Support at 5-6. Movants anticipate that, if the United States owns the lands underlying the marine areas in Southeast Alaska, they will be permitted to harvest herring roe on kelp for sale under ANILCA. *Id.* at 2.

Movants' only interest in the subject of this litigation is thus wholly derivative of the United States' position that it defeated Alaska's title to the submerged lands. It is based solely on the operation of a federal statute of general application relating to the management of federal public lands.

Although Movants stress that they are Alaska Natives, *id.* at 1, their asserted interest is independent of their status as Alaska Natives because ANILCA's subsistence provisions encompass all "rural Alaska residents." *See* 16 U.S.C. § 3113 (defining "subsistence uses" for purposes of ANILCA). Moreover, although Movants liken themselves to Indian tribes, Brief in Support at 5-6, they do not claim that they constitute a tribe or other governmental organization, and neither the United States nor Alaska has recognized them as tribes.[2]

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[2] Movants suggest that they represent or constitute "communities" under ANILCA. Even if true, any "community" interest is indistinguishable from the individual Movants' interests.

Movants' interest thus has no bearing on the question of title, the sole issue to be resolved between the sovereign parties. As shown below, their interest is insufficient to warrant intervention under the stringent standard applicable to this original action.

ARGUMENT

Movants present no interest in their own right that is not properly represented by the sovereigns already parties. Consequently, Movants fail to meet the high standard this Court has established for intervention by third parties in original actions, a standard that guards against expanding an original action to the dimensions of a class action. But even if intervention were guided by the looser standards under the Federal Rules of Civil Procedure, both intervention as of right and permissive intervention should be denied. Under those rules, Movants have no entitlement to intervention as of right because they have only a derivative interest in the subject matter of this case and not a direct interest, and what interest they have is more than adequately represented by the United States. And permissive intervention should be denied because Movants can contribute most effectively and most expeditiously by participating as *amici curiae*.

I. MOVANTS HAVE NOT SATISFIED THE STRINGENT CRITERIA FOR INTERVENTION IN ORIGINAL ACTIONS.

A. As a General Rule, Parties May Not Intervene in Original Actions Involving Their Governments.

Movants' briefing in support of their motion to intervene improperly addresses only Rule 24 of the Federal Rules of Civil Procedure and the interpretation thereof. Supreme Court Rule 17.2 provides in part that the Federal Rules of Civil Procedure "may be taken as guides" in cases brought under the Court's original jurisdiction, but the Court has made clear that "the federal rules are a guide to the conduct

of original actions in this Court only 'where their application is appropriate.'" *Utah* v. *United States*, 394 U.S. 89, 95 (1969) (citation omitted). Where, as here, parties seek to intervene in original actions, the Court has held that application of the federal rules is *not* appropriate. Rather, in these circumstances the Court has established a general rule that reflects the special considerations governing the exercise of the Court's original jurisdiction, and that eclipses the application of Rule 24. *See United States* v. *Nevada*, 412 U.S. 534, 538 (1973) (acknowledging that in district court, movants would be permitted to intervene under Federal Rules, but that intervention in original action would be denied under general rule applicable to cases under the Court's original jurisdiction); *see also Nebraska* v. *Wyoming*, 515 U.S. 1, 28 (1995) (Thomas, J., dissenting).

The general rule is stated succinctly in *Nebraska* v. *Wyoming*, 515 U.S. at 21, as follows:

> Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State "must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173 (1930). A State is presumed to speak in the best interests of those citizens, and requests to intervene by individual contractees may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a "showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953); cf. Fed. Rule Civ. Proc. 24(a)(2).

The rule is not limited to original actions between States, but also applies to original actions between the United States and an individual State or States. *See United States* v. *Nevada*, 412 U.S. at 538.

The general rule is built not only on respect for the interest of the sovereign parties to the original action, but also the Court's interest in ensuring that its original jurisdiction is exercised sparingly. *Utah*, 394 U.S. at 95; *see also New Jersey*, 345 U.S. at 372-373; *Kentucky*, 281 U.S. at 173. In *New Jersey* v. *New York*, 345 U.S. at 372-373, the Court explained that the rule

> is a recognition of the principle that the state, when party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Concluding that the Court's "original jurisdiction should not thus be expanded to the dimensions of ordinary class actions," the Court advanced a rule that strongly favors representation by the sovereign of all citizens' general interests in original actions. *Id.* at 373.

Nor is the rule limited to situations where parties seek to support the positions of their States. To the contrary, in *Kentucky* v. *Indiana*, the Court held that citizens of Indiana could not appear in an original action to challenge the validity of a contract between Kentucky and Indiana, even though Indiana did not contest the issue. As the Court held:

> Citizens, voters, taxpayers, merely as such, of either State, without a showing of any further and proper interest, have no separate individual right to contest in such suit the position taken by the State itself. Otherwise, all the citizens of both States, as one citizen, voter, and taxpayer has as much right as another in this respect, would be entitled to be heard. [281 U.S. at 173.]

B. Movants' Asserted Interests Do Not Justify Intervention Under the Criteria Applicable to Original Actions.

As noted, to be entitled to intervene in this original action, Movants must demonstrate (1) that they have a compelling interest that is held in their own right, distinct from an interest held in common with other citizens and creatures of the state; and (2) that the interest is not already properly represented. *New Jersey*, 345 U.S. at 373. As shown below, Movants have failed to satisfy either of these stringent criteria. Indeed, permitting Movants to intervene would raise the specter of a parade, without limit, of other parties seeking to intervene to litigate the merits of a title dispute which, properly viewed, lies solely between the sovereigns.

1. The only interest Movants assert is based on the subsistence preference ANILCA presently affords rural residents for the taking of fish and wildlife on federal lands. *See* 16 U.S.C. § 3114. Movants have no claim in their own right to title of the submerged lands; instead, they simply claim an interest in exercising their rights under ANILCA in the marine waters of the Tongass National Forest if title to the submerged lands underlying these waters is quieted in the United States.

This interest does not stand apart from the interest of other citizens or creatures of the state. The interest in the subject matter of the litigation asserted by Movants is shared with all rural residents. *See* 16 U.S.C. § 3113.[3] The interest is derived from a federal statute of general application that affects not only all rural residents of Alaska, but also all non-rural residents of Alaska and even residents of other States

[3] The fact that Movants filed a lawsuit that is pending in federal district court in Alaska relating to these subsistence rights does not set Movants' subsistence rights apart from or above the interest held by any other rural residents.

whose use of fish and wildlife may be curtailed in order to provide a priority for rural subsistence users on federal lands. *See* 16 U.S.C. §§ 3112, 3125. Any of these individuals or classes of users has the same "interest" in title as Movants.

Moreover, all Alaska residents have a right under Article VIII, Section 3 of the Alaska Constitution to "common use" of resources on State-owned lands and waters. Under Movants' theory, any or all of these people would have a right to intervene in *support* of the State's title claim. The same is true for all commercial fishermen, whether or not Alaska residents. Even tourists or cruise ship operators interested in visiting the waters of Southeast Alaska might be permitted to intervene to support or oppose one side or the other under Movants' theory.

Movants' motion therefore presents just the situation warned against in *New Jersey*. In that case—a suit to enjoin the diversion of river water—the Court denied intervention to one downstream user of the water, the City of Philadelphia, because the City was just one of many such users, and allowing it to intervene would thus open the floodgates to intervention by all other users of the river. 345 U.S. at 373. The same is true here. Movants are just some of the many people and entities who use the vast waters of Southeast Alaska. Were Movants held to have an adequate interest in their own right based on no more than a derivative interest in title being quieted in the United States or Alaska, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* As in *New Jersey*, this case should not be expanded to the dimensions of a class action, *id.*, in which the added members of the "class" have neither an interest in title in their own right to assert, nor any interest that bears on the merits of either sovereign party's claim of title.[4]

[4] The United States claims title to the submerged lands that are the subject of this action on its own behalf and on behalf of all its

Accordingly, under the *New Jersey* rule leave to intervene should be denied, and the sovereign parties left to resolve their competing claims to title, on behalf of themselves and their respective citizens, whose myriad interests these sovereigns are properly deemed to represent before the Court.

2. Under the special rule applicable to original actions, the Court need not examine whether Movants' interests are sufficiently represented, because Movants have no compelling interest distinct from the interests of other residents of Alaska. But even if the Court were to conclude otherwise, Movants have not demonstrated that the United States does not properly represent their interest in this action. To the contrary, the United States is actively defending its asserted title to the submerged lands underlying the marine waters in Southeast Alaska, which is precisely the same position Movants seek to vindicate. *See, e.g.*, United States' Answer to Amended Complaint.

In *New Jersey*, the Court denied the City of Philadelphia's motion to intervene in an action involving the Commonwealth of Pennsylvania because the City was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interest." 345 U.S. at 374. Likewise here, Movants seek to litigate precisely the same position taken by the United States, one of the sovereign parties to this action. Like the City of Philadelphia, Movants are "unable to point out a single concrete consideration in respect to which the [United

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citizens, under the Property Clause of the United States Constitution, art. IV, § 3, cl. 2, and certain exceptions to the Submerged Lands Act, 43 U.S.C. § 1301 *et seq*. The United States is the only party other than the State of Alaska that has a claim of title to the submerged lands in dispute. Alaska's claim, on its own behalf and that of all its citizens, is based, *inter alia*, on its sovereign constitutional right as a State to admission to the Union on an equal footing with all other States, and the Submerged Lands Act.

States] position does not represent [their] interest" in this action. Movants make no suggestion that the United States' position that it defeated Alaska's title to the submerged lands at issue is in any way at odds with Movants' position, and both seek identical relief.

Under the Court's rule, Movants cannot meet their burden by alleging that their participation is necessary to ensure that the United States will vigorously defend its own claim to title. *See* Brief in Support at 5. In *this* action, Movants' and the United States' positions are completely aligned. It is of no moment that the two are adversaries in another setting, a separate action initiated by Movants in district court. Movants ground their distrust of the United States on the United States' opposition to their motion for a preliminary injunction. *See* Ex. B to Brief in Support. Yet the mere fact that the United States pointed out that Movants had, as plaintiffs, failed to meet their heavy burden to justify a preliminary injunction does not make the United States an improper representative of its own title interest in this new action. Whatever bearing the statements of the United States in that action may have on its claim to title here, there is no doubt that the United States has clearly asserted that claim in this case and is vigorously litigating its position. Movants, who have *no* interest in that title in their own right, cannot reasonably be considered the more proper representative of this title claim. On the contrary, Movants' interest in this action "is invariably served" by the United States' position. *New Jersey*, 345 U.S. at 374. Accordingly, the motion for leave to intervene should be denied.

C. Movants' Interest Does Not Compare to Those of Other Parties Permitted to Intervene in Original Actions.

Movants rely on *Arizona* v. *California*, 460 U.S. 605 (1983), but that case only highlights the fact that they can show no comparable, direct interest apart from other citizens

or creatures of the state in the matter adjudicated. In *Arizona,* an original action to determine rights to the waters of the Colorado River, the United States had intervened to adjudicate water rights for the reservations of five Indian tribes. *Id.* at 608. Subsequently, the five tribes were permitted to intervene to assert additional tribal claims to water rights, beyond what the United States had litigated. *Id.* at 612. The five tribes each held, in their *own* right, a direct interest in the adjudication of the tribal reservations' water rights. *Id.* at 614-615. The tribes' rights were not held in common with all other citizens. And the Court found it proper that the tribes be encouraged to represent their own interest, as " 'independent and qualified members of the modern body politic.' " *Id.* at 615 (quoting *Poafpybitty* v. *Kelly Oil Co.*, 390 U.S. 365, 369 (1968)) (additional citation omitted). The *New Jersey* rule accordingly did not apply, and intervention was deemed proper under Rule 24 of the Federal Rules of Civil Procedure. *Id.*

The interest of Movants is vastly different from the interest of the tribes in *Arizona*. Movants are not tribes, and possess no tribal or other claim of title to the submerged lands at issue. Unlike in *Arizona*, every party with a direct interest in the matter to be adjudicated is already a party to this action, without intervention. Moreover, while in *Arizona* only the direct interest of five tribes was at stake, in this case an unlimited number of persons or entities share an interest in the outcome of the quiet title action in common with Movants. The five tribes were allowed to participate in *Arizona* because they asserted direct water rights not asserted by the United States and not shared by all other users of the Colorado. Movants' motion here, however, falls under the Court's general rule that the sovereigns properly represent their citizens' interests in original actions.

Movants thus do not possess the kind of direct interest that the Court has recognized may justify intervention by private parties. *See, e.g., Oklahoma* v. *Texas*, 258 U.S. 574 (1922)

(where Court held proceeds of oil and gas produced from the Red River area in receivership, private parties with claims to net proceeds were allowed to intervene). The contrast can be illustrated by reference to *Maryland* v. *Louisiana*, 451 U.S. 725 (1981). In *Maryland*, several States, joined by the United States, sued Louisiana, challenging the constitutionality of Louisiana's first use tax on certain uses of natural gas brought into that state. With little discussion, the Court permitted 17 gas pipeline owners, upon whom the tax was directly imposed, to join in the action because their companies had a direct stake in the controversy and could add to a full exposition of the issues. *Id.* at 745 n.21. The States and the United States actually had less direct interests in the matter than the pipeline owners, but found standing through their status both as purchasers of the gas at increased cost and as *parens patriae* for their respective citizens who would face increased energy costs as a result of the tax. *Id.* at 736-737; *see also id.* at 769 n.6 (Rehnquist, J., dissenting). Movants in this matter, rather than possessing a direct interest akin to that of the pipeline company owners, possess an interest akin to that of a general consumer facing increased costs, an interest properly represented by the sovereign.

Under these circumstances, the Court's general rule properly favors representation of Movants' interest in this action by the sovereign party.

II. EVEN IF THE FEDERAL RULES OF CIVIL PROCEDURE WERE APPLICABLE, INTERVENTION SHOULD BE DENIED.

As set forth above, the Court has made clear that the provisions of the Federal Rules of Civil Procedure do not apply to motions to intervene in original actions. Nevertheless, any guidance that might be provided by those rules also counsels in favor of denial of Movants' motion.

A. Movants Would Not be Entitled to Intervention as of Right.

Rule 24(a) of the Federal Rules of Civil Procedure provides in part that, upon timely application, a party may intervene as a matter of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Movants do not meet this standard.

1. Movants Do Not Claim an "Interest" Within the Meaning of Rule 24(a).

As noted above, Movants do not claim a direct interest in the submerged lands at issue in this case. Instead, they claim only that, if the United States prevails, they will have certain rights under ANILCA to harvest and sell resources from those lands. That is not the kind of interest required for intervention as of right.

Rule 24(a) requires that the applicant assert "a significantly protectable interest." *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971). While this Court has not further explained this requirement, several lower courts have concluded that intervention of right requires a "direct, substantial, legally protectable interest in the proceedings." *See, e.g., New Orleans Pub. Serv., Inc.* v. *United Gas Pipe Line Co.*, 732 F.2d 452, 463-464 (5th Cir.) (and cases cited therein), *cert. denied*, 469 U.S. 1019 (1984). As the Fifth Circuit has explained:

> What is required is that the interest be one that the *substantive* law recognizes as belonging to or being owned by the applicant. This is reflected by the requirement that the claim the applicant seeks intervention in order to assert be a claim as to which the applicant is the real party in interest. The real party in interest requirement of Rule 17(a), Fed.R.Civ.P., applies to intervenors as well as plaintiffs, as does also the rule that a party has no standing to assert a right if it is not his own. [*Id.* at 464 (citations, footnote, and internal quotes omitted).]

The interest, moreover, "must be based on a right that belongs to the proposed intervenor rather than to an existing party in the suit," and "must be so direct that the applicant would have a right to maintain a claim for the relief sought." *Keith* v. *Daley*, 764 F.2d 1265, 1268 (7th Cir.) (citations and internal quotes omitted), *cert. denied*, 474 U.S. 980 (1985). Indeed, the Seventh, Eighth, and D.C. Circuits equate this requirement to the Article III jurisdictional requirement for standing that there be a true case or controversy. *See, e.g., Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996); *Mausolf* v. *Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); *City of Cleveland* v. *Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994).[5]

Whether or not Article III standing is required, the fact remains that Movants here have no direct, legally protected interest in the subject matter of this lawsuit: title to the disputed submerged lands. Movants have no right, ability, or legal capacity to maintain a claim for a judgment quieting title in the United States. *See* 28 U.S.C. 2409a(a); *cf. Block* v. *North Dakota*, 461 U.S. 273, 286 (1983) (adverse claimants may challenge United States' title interest). Their interest is solely a derivative interest, not adverse to that of the United States. The relief they seek is precisely the same relief sought by the United States, a judgment quieting title *in the United States*, not in Movants. Because the alleged

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[5] In *Diamond* v. *Charles*, 476 U.S. 54, 69 n.21 (1986), this Court noted that lower courts had reached different conclusions on this issue, but declined to address it.

interest in title is in the United States, not Movants, intervention as of right is not available.

2. Movants Have Not Shown That the United States May Not Adequately Represent Their Interests.

Intervention as of right under Rule 24(a) is also not available if "the applicant's interest is adequately represented by existing parties." To be sure, the Court has stated that the burden of showing that representation may be inadequate for intervention under Rule 24(a) "should be treated as minimal." *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). But *Trbovich* does not mean that the requirement of showing that representation may be inadequate has been written out of the rule entirely. *Bush* v. *Viterna*, 740 F.2d 350, 355 (5th Cir. 1984).

Because the objective of the applicants for intervention is identical to that of one of the parties as here, intervention should be denied absent "a concrete showing of circumstances * * * that make [the existing party's] representation inadequate." *City of Stilwell* v. *Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042-43 (10th Cir. 1996) (quotation and citation omitted); *see also Northwest Forest Res. Council* v. *Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). Moreover, "where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required." *Hopwood* v. *Texas*, 21 F.3d 603, 605 (5th Cir. 1994). Several Circuits presume adequate representation by a governmental agency, with at least one requiring "a strong affirmative showing that the sovereign is not fairly representing the interests of the applicant." *United States* v. *Hooker Chem. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984) (and cases cited therein).

Movants have not demonstrated inadequacy of representation under the standards applied by the lower courts pursuant to Rule 24. Some courts have held that an applicant for

intervention must prove "adversity of interest, collusion, or nonfeasance." *Viterna*, 740 F.2d at 355-356; *accord Jordan* v. *Michigan Conference of Teamsters Welfare Fund*, 207 F.3d 854, 862 (6th Cir. 2000). Moreover, under this rule the required adversity of interest must be in the case before the court with respect to the issues before the court, not in some other proceeding on some other issue. *Viterna*, 740 F.2d at 356-357.

As shown above (*supra* at 9), Movants' allegations of inadequate representation fall far short under this test, because there is no indication that the United States is not vigorously litigating its claim of title in this case. *See Archer* v. *United States*, 268 F.2d 687, 690 (10th Cir. 1959) (in quiet title action between United States and Utah, motion by holder of mining claim to intervene in support of United States denied because "[t]he good faith efforts of the United States to maintain its title against Utah and those claiming under Utah assures adequate representation"). As in *Viterna*,

> [t]his is not a case in which the party with whom the applicant would be aligned has taken a position in direct opposition to the intervenor; this is not a suit in which no existing party has voiced applicant's concerns; this is not a case where the applicant has a defense not available to the present defendant; this is not a suit in which it is clear that the applicant will make a more vigorous presentation of arguments than existing parties; this is not a suit in which no party views the applicant's claims favorably. Indeed, this case is more closely aligned with those cases in which courts have determined that the burden of showing inadequacy of representation has not been met * * *. Therefore, this is not a case in which we can say that the [applicants for intervention] are "without a friend in the litigation." [740 F.2d at 357-358 (citations omitted).]

Nor have Movants shown inadequacy of representation under other standards applied by the lower courts. The Ninth Circuit asks:

> (1) [a]re the interests of the present party in the suit sufficiently similar to that of the absentee such that the legal arguments of the latter will undoubtedly be made by the former; (2) is that present party capable and willing to make such arguments; and (3) if permitted to intervene, would the intervenor add some necessary element to the proceedings which would not be covered by the parties in the suit? [*Blake* v. *Pallan*, 554 F.2d 947, 954-955 (9th Cir. 1977).]

Under this test, as well, Movants fall short. Their interests are identical to those of the United States and they would make the same arguments that the United States undoubtedly will make; they have not shown that the United States is either incapable or unwilling to make those arguments; and they have not shown that they can add anything new to the case.

B. Permissive Intervention Should be Denied Because Movants Can Contribute Most Effectively and Expeditiously as *Amici Curiae*.

In his Case Management Order No. 2 at 2, Special Master Maggs has provided for participation by *amici curiae*. In an oft-quoted passage, Judge Wyzanski observed that

> [i]t is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention. [*Crosby Steam Gage & Valve Co.* v. *Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943).]

Alaska submits that Movants can contribute most effectively and most expeditiously by participating as *amici curiae*. Such a course would also protect the significant interests that support the Court's general rule against intervention by private parties in original actions. Accordingly, in the exercise of sound discretion, Movants' motion for permissive intervention should be denied.

CONCLUSION

For all the foregoing reasons, Movants' motion for leave to intervene should be denied.

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Supreme Court, U.S.
FILED
APR 18 2001
CLERK

(4)

No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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5 MP

Both the United States and the State of Alaska base their opposition to the motion to intervene in this litigation upon two principal arguments: 1) the Proposed Interveners have no stake in this litigation sufficiently separate and distinct from those of the public at large; and 2) the interests of the Proposed Interveners will be adequately represented in these proceedings by the United States. Both arguments are incorrect.

Analysis

The Proposed Interveners' legal rights and interests will be uniquely affected by the outcome of this litigation. As native rural Alaskans who live and work on one of the islands located next to the waters of the Tongass National Forest covering the submerged lands at issue here, the Proposed Interveners' right to continue their traditional and customary harvest of herring roe on kelp at that location is recognized and protected by federal law. As the Congress declared in 16 U.S.C. § 3111:

> The Congress finds and declares that -
>
> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.
>
> (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

The Proposed Interveners and their ancestors have engaged in this harvest in those waters since long before the founding of the United States. Under federal law, the Secretary of the Interior is required to ensure that people such as Proposed Interveners, who are actually engaged in subsistence uses, have reasonable access to the resources necessary to those uses located on public lands or the waters over them. 16 U.S.C. § 3121(a). The right protected by federal law to continue this traditional form of subsistence food-gathering in the waters above the submerged lands in the Tongass National Forest at issue in this litigation is unique to the Proposed Interveners; no one else seeks to do so. Proposed Interveners' interest is, therefore, very much akin to the sort of interest that both Alaska and the United States concede would justify Proposed Interveners' participation as parties to this litigation. Brief For The United States In Opposition ("U.S. Opposition") at 10; Opposition of Plaintiff State Of Alaska To Motion For Leave To Intervene And File Answer ("Alaska Opposition") at 10. Under Alaska's statutory scheme for the control of harvesting herring roe on kelp, Proposed Interveners' right to conduct their harvest, a right which is shared with no other people, would be greatly restricted. Clearly, the Proposed Interveners do not have the sort of diffuse, general interest that does not support intervention. They have a unique interest that could be irreparably impaired by the outcome of this litigation and should be allowed to intervene. *See, e.g., Arizona v. California,* 460 U.S. 605 (1983); *Maryland v. Louisiana,* 451 U.S. 725 (1981).

The Proposed Interveners' unique interest is highlighted by the circumstances showing why the Proposed Interveners should not be compelled to rely upon the United States to represent its interests in this litigation. Because the Department of the Interior and the Federal Subsistence Board refused to assert federal ownership of the submerged

lands within the Tongass National Forest at issue here and even went so far as to *disclaim* federal ownership, Proposed Interveners were forced to commence suit in the District Court for the District of Alaska to defend their rights under federal law. Because the results of this litigation will control Proposed Interveners' rights, the Proposed Interveners' lawsuit in District Court has been stayed pending completion of these proceedings. After nearly ten years of litigation, in which the United States Government took precisely the opposite position it takes here, that Government and the State of Alaska now tell the Proposed Interveners that they should be content to have their rights conclusively adjudicated in a proceeding to which they cannot become parties and cannot exercise any control over settlement or other disposition. These circumstances clearly demonstrate not only the Proposed Interveners' unique stake in the outcome of this litigation, but also the manifest unfairness of forcing them to rely upon their opponent in the Alaska District Court litigation for the past ten years to vigorously advocate their position in this case. What assurance do the Proposed Interveners have that the United States will not once again change its position on the ownership of the submerged lands in the Tongass National Forest? The Proposed Interveners are entitled to a day in court and, as a practical matter, this is the only Court in which they can be heard effectively.

Conclusion

Clearly, the Proposed Interveners have an interest and stake in the outcome of this litigation that sets them apart from the general public that normally must rely upon the sovereign to represent their interests in litigation. The Proposed Interveners will be uniquely affected by the outcome here and should be allowed to participate as parties. The Proposed Interveners should not have to rely upon their

long-time opponent in the Alaska District Court litigation to represent their interests adequately in these proceedings. The Motion For Leave To Intervene And Serve An Answer should be granted.

Dated: April 17, 2001 Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 26 2001
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(2)

No. 128, Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF ALASKA,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ON MOTION FOR LEAVE TO INTERVENE
AND FILE ANSWER

REPORT OF THE SPECIAL MASTER ON THE MOTION TO INTERVENE BY FRANKLIN H. JAMES, THE SHAKAN KWAAN THLING-GIT NATION, JOSEPH K. SAMUEL, AND THE TAANTA KWAAN THLING-GIT NATION

GREGORY E. MAGGS
Special Master
Washington, D.C.

November 2001

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I. Introduction

This report concerns a motion by two individuals and two communities of native Alaskans to intervene and file an answer in No. 128, Original, *State of Alaska v. United States*. The report recommends that the Supreme Court deny the motion on the basis of *parens patriae* principles.

II. Subject Matter of No. 128, Original

This original action began on June 12, 2000, when the Supreme Court granted the State of Alaska leave to file a bill of complaint against the United States. *See Alaska v. United States*, 120 S. Ct. 2681 (2000). Alaska's complaint asks the Court to quiet title to vast expanses of marine submerged land pursuant to the Quiet Title Act of 1972, 28 U.S.C. § 2409a. The submerged land is located in southeastern Alaska's Alexander Archipelago. This Archipelago includes more than 1000 islands, and covers an area nearly 600 miles long and 100 miles wide. The submerged land at issue lies off the mainland coast of Alaska and off the shores of the numerous islands in the Archipelago. The papers filed in the present action do not specify why Alaska values the underwater lands in controversy.[1]

Alaska claims that title to the submerged lands involved in this case passed from the United States to Alaska when Alaska became a state in 1959. Although this action has not progressed beyond its early stages, Alaska already has outlined the legal argument that it intends

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[1]In past litigation, Alaska and the United States have disputed the ownership of other marine submerged lands for various reasons. One case involved construction of an obstacle to navigation. *See United States v. Alaska*, 503 U.S. 569 (1992) (No. 118, Orig.). In other cases, the submerged lands have contained oil or gas. *See United States v. Alaska*, 530 U.S. 1021 (2000) (No. 84, Orig.); *United States v. Alaska*, 422 U.S. 184 (1975).

to present in support of its position. *See* Brief in Support of Motion for Leave to File a Complaint, *Alaska v. United States*, No. 128 Orig. (U.S. Nov. 24, 1999). The state has indicated that it will rely principally on the "Equal Footing" doctrine and the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315. *See* Brief in Support of Motion for Leave to File a Complaint, *supra*, at 4.

The Equal Footing doctrine says that new states entering the Union have the same sovereign powers and jurisdiction as the original thirteen states. *See Coyle v. Smith*, 221 U.S. 559, 573 (1911). Under this doctrine, subject to certain limitations, a new state generally acquires title to the beds of inland navigable waters. *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987). The Submerged Lands Act of 1953 declares that states generally have title to all lands beneath inland navigable waters and offshore marine waters within their "boundaries." *See* 43 U.S.C. § 1311(a)(1). Under the Act, a state's boundaries may extend three geographic miles from the coast line. *See id.* § 1301(b). The Act, however, contains an exception for lands expressly retained by the United States when a state enters the Union. *See id.* § 1313(a).

Alaska's complaint, as amended on January 8, 2001, states four claims. *See* Amended Complaint to Quiet Title, *Alaska v. United States*, No. 128 Orig. (U.S. Dec. 14, 2000); *Alaska v. United States*, 121 S. Ct. 753 (2001) (granting leave to amend complaint). Counts I and II both claim that the submerged lands in the Alexander Archipelago lie beneath inland waters and therefore passed to the state under the Equal Footing doctrine. *See* Amended Complaint to Quiet Title, *supra*, ¶¶ 4-41. Count I alleges that the waters of the Archipelago historically have been considered inland waters. *See id.* ¶ 7. Count II asserts that the waters also qualify as inland waters because they lie within several juridical bays defined by the Archipelago's geographic features. *See id.* ¶ 25.

Count III concerns an area within the Alexander Archipelago designated as the Tongass National Forest. Subject to certain exceptions, the United States retained title to the Tongass National Forest when Alaska became a state. *See* Act of July 7, 1958, Pub. L. No. 85-508 § 5, 72 Stat. 339, 340 [*hereinafter* Alaska Statehood Act]. Alaska, however, claims title to "all lands between the mean high and low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest." Amended Complaint to Quiet Title, *supra*, ¶ 43.

Count IV concerns another area within the Alexander Archipelago formerly designated as the Glacier Bay National Monument and now called the Glacier Bay National Park and Preserve. Again, subject to certain exceptions the United States retained title to the Glacier Bay National Monument when Alaska became a state. *See* Alaska Statehood Act, *supra*, § 5. Alaska, however, claims title to "all the lands underlying marine waters within the boundaries of Glacier Bay National Monument" under the Equal Footing doctrine and the Submerged Lands Act. Amended Complaint to Quiet Title, *supra*, ¶ 61.

The United States has not undertaken to outline the arguments that it intends to present in defense. With Alaska, however, the United States has identified in some detail the issues that it believes this litigation will present. *See* Joint List of Subsidiary Issues, *Alaska v. United States*, No. 128 Orig. (U.S. Apr. 16, 2001); Brief for the United States On Motion for Leave to File a Bill of Complaint at (I), *Alaska v. United States*, No. 128 Orig. (U.S. Apr. 12, 2000). Ultimately, the Court most likely will have to decide whether the waters of Alexander Archipelago truly are inland waters for the purpose of the Equal Footing doctrine and the extent to which the United States retained marine submerged lands when it reserved the Tongass National Forest and the Glacier Bay National Monument.

III. The Proposed Intervenors

On February 26, 2001, Franklin H. James, the Shakan Kwaan Thling-Git Nation, Joseph K. Samuel, and the Taanta Kwaan Thling-Git Nation (the "Proposed Intervenors") filed a motion to intervene as defendants and sought leave to file an answer to Alaska's complaint. The State of Alaska and the United States each filed an opposition to the motion, and the Proposed Intervenors filed a reply. The Court referred this motion to the Special Master. *See Alaska v. United States*, 121 S. Ct. 1731 (2001). The Special Master requested and received supplemental briefs, and heard oral argument.

A. Identity and Interest

According to the Proposed Intervenors, Franklin H. James is the First Chairholder and Tribal Spokesman for the Shakan Kwaan Thling-Git Nation, which is a band of Thling-Git natives whose ancestral home is in Southeast Alaska. Joseph K. Samuel is the First Chairholder and Tribal Spokesman for the Taanta Kwaan Thling-Git Nation, which is another band of Thling-Git natives whose ancestral home also is in Southeast Alaska. *See* Brief in Support of Motion for Leave to Intervene and File Answer at 1-2, *Alaska v. United States*, No. 128 Orig. (U.S. Feb. 20, 2001).

The Shakan Kwaan and Taanta Kwaan Nations are described by the Proposed Intervenors as "both a 'community' and an 'extended family.'" *Id.* All of their members are native Alaskans. The two Nations, however, are not recognized as Indian Tribes having a government-to-government relationship with the United States. *See* 65 Fed. Reg. 13,298 (2000) (listing federally recognized tribes).

The answer that the Proposed Intervenors seek leave to file in this case denies that Alaska has title to the submerged land located within the Tongass National Forest. *See* Proposed Answer of Intervention ¶ 27, *Alaska v. United States*, No. 128 Orig. (U.S. Feb. 20, 2001). The Proposed Intervenors do not claim that they own this land.

Instead, the Proposed Intervenors seek to intervene in support of the United States's claim to ownership of the property.

The Proposed Intervenors care whether title to submerged lands in the Tongass National Forest belongs to Alaska or the United States because the answer may affect their ability to harvest herring roe on kelp.[2] They allege that members of the Shakan Kwaan and Taanta Kwaan Thling-Git Nations have harvested herring roe on kelp in the waters of Southeastern Alaska since time immemorial. This harvesting stopped in 1968 when Alaska prohibited customary trade in herring roe. The Proposed Intervenors believe that if the United States has title to the land they could resume the harvesting pursuant to Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3111 *et seq.*

Title VIII of ANILCA provides that "the taking on public lands [of the United States] of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. § 3114. The statute defines "subsistence uses" to include "the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption, as food, shelter, fuel, clothing, tools, or transportation; . . . for barter or sharing for personal or family consumption; and for customary trade." *Id.* at § 3113. The Proposed Intervenors believe that their harvesting of herring roe would satisfy each of these requirements.

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[2]Herring is an important food fish found in the waters off Alaska's coast and elsewhere. Roe is the name given for a mass of fish eggs. Kelp is an underwater plant. Herring roe attached to kelp traditionally has been harvested for human consumption.

B. The *Peratrovich* Litigation

The Proposed Intervenors do not believe that the United States will oppose in a zealous manner Alaska's claim to the submerged lands in the Tongass National Forest. Their distrust stems from positions taken by the United States in a federal district court case styled *Peratrovich et al. v. United States*, No. A92-734 Civil (D. Alaska).[3] The proceedings of the *Peratrovich* litigation, therefore, require careful description.

In 1991, according to information found in the *Peratrovich* record, members of the Shakan Kwaan and Taanta Kwaan Nations applied to the Federal Subsistence Board for a permit to engage in the gathering of roe in the Tongass National Forest. The Federal Subsistence Board is a body established by the Secretary of the Interior and the Secretary of Agriculture. *See* 36 C.F.R. § 242.10(a) (2001). It has responsibility for administering the subsistence taking and uses of fish and wildlife on "public lands" of the United States. *Id.*

In their application, the members of the Shakan Kwaan and Taanta Kwaan Nations claimed a right to engage in the gathering of roe under ANILCA. The Federal Subsistence Board, however, refused to consider and act upon their applications. The Board explained that its regulations did not permit it to exercise jurisdiction in part because navigable waters were not "public lands" of the United States. The Board explained that "the United States generally does not hold title to navigable waters." Complaint for Injunctive and Declaratory Relief exh. E, *Peratrovich et al. v. United States*, No. A92-734 Civil (D. Alaska Dec. 2, 1992).

After failing to obtain a federal permit from the Federal Subsistence Board, these members of the Shakan Kwaan and Taanta

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[3]The Special Master has requested, received, and reviewed pertinent portions of the *Peratrovich* record.

Kwaan commenced the *Peratrovich* litigation by suing the United States in the United States District Court for the District of Alaska.[4] The complaint asserts that the Federal Subsistence Board violated its duty to act on the merits of their application. *See id.* ¶ 40.

The *Peratrovich* litigation and this original action have an important issue in common, namely, whether the United States or Alaska has title to the marine submerged lands within the area designated as the Tongass National Forest.[5] The Proposed Intervenors argue that, in *Peratrovich*, the United States "has previously not taken a strong position in regard to this issue." Brief in Support of Motion for Leave to Intervene and File Answer at 5, *Alaska v. United States*, No. 128 Orig. (U.S. Feb. 20, 2001). Accordingly, they assert that the United States in this original action "cannot ensure adequate representation sufficient to guarantee the Proposed Intervenors the level of advocacy their members demand." *Id.*

To support this contention, the Proposed Intervenors have focused on the *Peratrovich* plaintiffs' request for a preliminary injunction. In their complaint, the plaintiffs asked the district court to order that the

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[4]The named plaintiffs in the *Peratrovich* litigation are the same as the Proposed Intervenors, except that the complaint names Lincoln Peratrovich rather than Franklin James as the Spokesman for the Shakan Kwaan.

[5]Under Alaska state law, ownership of submerged lands does not give rise to a claim of title to the waters in the water column above the land. *See Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664, 677 (D. Alaska 1977). The Federal government, however, has determined by regulation to treat the navigable waters above federal lands as "public lands" for purposes of ANILCA. *See* 57 Fed. Reg. 22,942 (1992). Thus the determination of title to the submerged lands in question will likely determine the existence of federal subsistence harvesting rights in the water column above the land.

United States immediately issue the roe harvesting permits that the plaintiffs had sought from the Federal Subsistence Board. *See* Complaint for Injunctive and Declaratory Relief, *supra*, at 23. The United States opposed the granting of any preliminary injunction. *See* United States' Response to Motion for Preliminary Injunction, *Peratrovich v. United States*, No. A92-734 Civil, (D. Alaska Dec. 24, 1992).

The United States argued against granting the injunction in part because title to the marine submerged lands within the Tongass National Forest "Has Not Been Shown to Have Been Reserved by the United States." *Id.* at 20. The United States took the position that it would have title to the submerged lands only if it had affirmatively reserved them when Alaska became a state. *See id.* at 20-22 (citing *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987)). The United States then asserted the inadequacy of three legal sources that the plaintiffs had relied upon to demonstrate that the United States had reserved title to the Tongass National Forest.

The first source cited by the plaintiffs was Section 24 of the Act of March 21, 1891, ch. 561, 26 Stat. 1095, 1103, which authorized the President to establish reservations of land like the Tongass National Forest. With respect to this source, the United States argued: "There is no indication in the legislative language of the necessary affirmative intent by Congress that any action by the President under that statute was 'affirmatively intended to defeat' any future state's title to submerged lands." *Id.* at 22.

The second source cited by the plaintiffs was a collection of proclamations by President Roosevelt creating the Tongass forest reserve. With respect to this source, the United States argued: "While the President clearly intended to create the forest reserve, there is no showing in those proclamations that these reserves were intended to defeat the title of the future state of Alaska to submerged lands at issue." *Id.*

The third source was Section 4 of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, note prec. 48 U.S.C. § 21, which identified certain lands that Alaska would not claim title to after statehood, but that did not include marine submerged lands in the Tongass area. The United States argued that another provision of the Statehood Act referred to 43 U.S.C. § 1311(a), a provision of the Submerged Lands Act. Section 1311(a), as noted above, generally vests ownership in lands beneath navigable waters in the states. The United States said: "Therefore, Section 4 of the Statehood Act does not operate as a disclaimer by the State of title to submerged lands." *Id.* at 23.

The United States concluded its argument by saying: "For the foregoing reasons, plaintiffs have failed to show a likelihood of success on the merits of their claim that title to the submerged lands within the Tongass National Forest was reserved to the United States at the time of statehood." *Id.* The district court did not grant the preliminary injunction.

In a later filing, the United States asked the district court to dismiss the *Peratrovich* case for failure to join an indispensable party, namely, Alaska. Here the United States argued: "Title to lands beneath navigable waters is generally held in trust for and conveyed to the respective state upon statehood. *Utah Division of State Lands v. United States*, 482 U.S. 193, 196-97 (1987). Therefore, the State's claim of ownership of the submerged lands under the marine waters within the exterior boundaries is not frivolous on its face." Defendant's Motion for Judgment on the Pleadings or to Dismiss at 10, *Peratrovich v. United States*, No. A92-734 Civil (D. Alaska Apr. 29, 1996).

In addition, in answering the plaintiffs' amended complaint, the United States did not claim ownership of the property. Paragraph 16 of the amended complaint said: "As a matter of fact and of law, at all times material to this lawsuit the title to all lands (including submerged

lands) within the exterior boundaries of the Tongass National Forest has been, and continues to be, in the United States." First Amended Complaint for Injunctive and Declaratory Relief at 15, *Peratrovich v. United States*, No. A92-734 Civil (D. Alaska Oct. 29, 1996). The United States answered: "The allegations of paragraph 16 of the Complaint constitute conclusions of law and are not factual allegations to which a response is required." Answer to Amended Complaint at 9, *Peratrovich v. United States*, No. A92-734 Civil (D. Alaska, Dec. 16, 1996).

The *Peratrovich* case has not reached a conclusion. After Alaska filed the present original action against the United States, the district court stayed the litigation. The district court explained that "it would not be a good use of resources for this court to undertake to resolve an issue which will be resolved by the United States Supreme Court in a fashion which will be controlling for purposes of this and other cases." Order Status Conference, *Peratrovich v. United States*, No. A92-734 Civil (D. Alaska Aug. 18, 2000).

The United States, strictly speaking, is not making contrary arguments in this case and *Peratrovich*. In *Peratrovich*, the United States argued that the plaintiffs had not shown that the United States had title to the marine submerged lands in the Tongass National Forest area. The United States, however, never actually admitted that Alaska has title to the submerged lands.

On the other hand, without prejudging this issue in any way, the Special Master notes that the United States may find it awkward to contradict some of what it contended in *Peratrovich*. For example, as described above, the United States said that the Act of March 21, 1891, the Alaska Statehood Act, and President Roosevelt's promulgations do not show that the United States retained title to the Tongass National Forest. Alaska has now adopted some of these arguments to support its position in the present original action. *See* Brief in Support of Motion to File A Complaint, *supra*, at 19-23.

IV. *Parens Patriae* Principles

Original jurisdiction cases against a state or the federal government often involve issues that concern not only the initial parties, but many others as well. For instance, the question whether a state or the federal government holds title to particular land may interest persons who live in the area or wish to use the property. Perhaps for this reason, motions to intervene in original jurisdiction cases are not uncommon.

In ruling on motions to intervene in original actions, the Supreme Court often has relied on *parens patriae* principles. These principles have led the Court to presume that a sovereign represents the interests of all of its citizens whenever the sovereign litigates a matter of sovereign interest. As a result, the Court generally has rejected motions to intervene by private parties in original actions involving states or the federal government, unless the private parties can show a reason for overcoming this presumption.

In *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), New Jersey filed an original action against New York State and New York City. New Jersey asked the Court to enjoin the defendants from diverting certain amounts of water from the Delaware river. *See id.* at 370. Later, Pennsylvania joined the lawsuit to protect its own rights. *See id.* at 371. The Court entered a decree establishing an apportionment of the water and retained jurisdiction. *See id.* Some time afterward, when New York moved for modification of the decree, the City of Philadelphia moved to intervene so that it could assert its own interest in the use of the Delaware River. *See id.* at 372.

The Supreme Court denied Philadelphia's motion to intervene on grounds that the State of Pennsylvania already represented Philadelphia's interests. The Court explained:

> The "*parens patriae*" doctrine . . . is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its

citizens." Com. of Kentucky v. State of Indiana, 1930, 281 U.S. 163, 173-174. The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

345 U.S. at 372-73.

The Court used similar reasoning in *Utah v. United States*, 394 U.S. 89 (1969). In that case, Utah sued the United States seeking to clear title to relicted lands resulting from the shrinking of the Great Salt Lake. *See id.* at 90. A private corporation, Morton International, Inc., claimed title to some of the land and sought to intervene. *See id.* The Court denied Morton's application. *See id.* at 96. Although the Court did not cite *New Jersey v. New York*, it emphasized the same concerns. In particular, the Court worried that the number of parties might become impractical if private citizens could intervene. The Court said: "If Morton is admitted, fairness would require the admission of any of the other 120 private landholders who wish to quiet their title to portions of the relicted lands, greatly increasing the complexity of this litigation." *Id.* at 95-96.

The Court also has relied on *parens patriae* principles when deciding whether and how to exercise its original jurisdiction. *See e.g., Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995) (dismissing fears that private citizens might later intervene in an original action because, under *New Jersey v. New York*, a state "is presumed to speak in the best interest of those citizens"); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam) (declining to exercise original jurisdiction so that private citizens, "who ordinarily would have no right to intervene in an original action in this Court, *New Jersey v. New York*, 345 U.S. 369 (1953), would have an opportunity to participate in their own behalf if this litigation goes forward in the

District Court."); *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930) (dismissing individual defendants from an original action on grounds that a "state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens").

In this case, the Proposed Intervenors are citizens of both Alaska and of the United States. Accordingly, under *parens patriae* principles Alaska and the United States are presumed to represent their interests. The Proposed Intervenors therefore cannot intervene unless they can show some basis for overcoming this presumption.

V. Exceptional Circumstances

The Proposed Intervenors have advanced a number of contentions that might be construed as arguments for overcoming the general presumption, based on *parens patriae* principles, that the United States and Alaska will represent their interests. In the end, however, they have not shown the existence of any established bases for overcoming the presumption. Nor have they presented any other sufficient reason for dispensing with the presumption.

A. *Compelling Interest*

In *New Jersey v. New York*, the Court identified a possible circumstance in which a private party could participate in an original action notwithstanding ordinary *parens patriae* principles. The Court indicated that a private party may intervene if the private party has a "compelling interest" in the litigation. The Court said more fully:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

345 U.S. at 373.

The Court ruled that Philadelphia could not show a compelling interest in *New Jersey v. New York* because its interests did not diverge from those of Pennsylvania. The Court explained that "[c]ounsel for the City of Philadelphia have been unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests." *Id.* at 374.

In this case, the Proposed Intervenors cannot claim a compelling interest in their own right; nor can they show that their interest is not properly represented by the United States. This is a case between two sovereigns to determine whether Alaska or the United States has title to the submerged lands at issue. The Proposed Intervenors are not claiming they have title to any property. They also are not seeking to claim, in this action, any rights that they may have under ANILCA. Instead, as noted above, they seek to argue exactly what the United States is arguing, namely, that the United States has title to certain marine submerged lands.

True, the Proposed Intervenors have a specific reason for wanting the United States to have title. In particular, a determination that the land belongs to the United States might allow them to assert rights under ANILCA in another forum. In the past, however, the Court has not considered derivative interests of this kind sufficient to permit intervention. In *Arizona v. California*, 530 U.S. 392 (2000), the United States participated in settling a dispute concerning the Colorado River Indian Reservation. *See id.* at 418-19. An association of families who were leasing property from the United States within the Reservation objected to the settlement and sought to intervene. *See id.* at 419 n.6. The Court, however, denied intervention because the Association's members did not own the land and made no claim to title or water rights. *See id.*

The Proposed Intervenors also argue that, despite the present agreement between their views and those of the United States, they cannot trust the United States to protect its own interests in the

Tongass area. They say that in the *Peratrovich* litigation the United States did not support their claim that the United States had title to the marine submerged land in the Tongass National Forest. Although the United States now insists that it does have title, the Proposed Intervenors ask: "What assurance do the Proposed Interveners have that the United States will not once again change its position on the ownership of the submerged lands in the Tongass National Forest?" Reply Brief in Support of Motion to Intervene and File Answer at 3, *Alaska v. United States*, No. 128 Orig. (U.S. Apr. 17, 2001).

The Proposed Intervenors, without question, have some basis for their concern. In *Peratrovich*, although the United States never actually asserted that Alaska owns the property, it made arguments that now support Alaska's position. As described at length above, the United States asserted that certain statutes and proclamations did not show an intent by the United States to retain title to submerged lands within the Tongass National Forest. The United States, moreover, has not ruled out the possibility that it might settle the case with Alaska and agree that Alaska has title to all or part of the submerged lands in dispute.

Concern about how the United States will conduct litigation to protect its position, however, does not rise to the level of a "compelling interest." The Court, in fact, has addressed this type of concern in two previous cases. In *Utah v. United States*, Morton International asked to intervene in part because the company felt that the Solicitor General was not protecting the United States's interests. *See* 394 U.S. at 94. Morton objected in particular to a stipulation by the Solicitor General that could deprive the United States of a claim to some of the subject property. *See id.* The Court rejected this line of argument. The Court recognized that Congress had entrusted the Solicitor General with authority to conduct the federal government's litigation. *See id.* at 95 (citing 28 U.S.C. § 518 (1964)). The Court, accordingly, reasoned that the Solicitor General had authority to

remove issues from the case if he believed that he could advance no argument to vindicate the government's interest. *See* 394 U.S. at 94-95. The Court concluded by saying "we can perceive no compelling reason requiring the presence of Morton in this lawsuit." *Id.*

In *Kentucky v. Indiana*, 281 U.S. 163 (1930), the Court similarly refused to allow individuals who doubted their state's litigation strategy to participate in an original action. In that case, Kentucky and Indiana agreed to build a bridge over the Ohio River. *See id.* at 169. A group of Indiana taxpayers and citizens sued Indiana in state court to block the construction. *See id.* Kentucky then brought an original action in the Supreme Court against Indiana and the individuals who were plaintiffs in the state action, seeking to restrain any breach of contract by Indiana. *See id.* The Court dismissed the individuals. *See id.* at 175. Although the individuals had cause to doubt Indiana's willingness to oppose Kentucky in the original action, the Court explained that the state of Indiana "must be deemed to represent all its citizens" and that the individuals had "no separate individual right to contest in such a suit the position taken by the state." *Id.* at 173.

For these reasons, the Proposed Intervenors have not shown a compelling interest in participating in the litigation.

B. *Indian Tribes*

The Supreme Court has permitted intervention in original actions more generously when the parties seeking intervention are Indian Tribes. In *Arizona v. California*, 460 U.S. 605 (1983), five Indian Tribes sought to intervene in an original action concerning water rights to the Colorado River. Although the United States already was litigating on their behalf, the Court decided that the Tribes should have a right to speak for themselves. *See id.* at 615. The Court said:

> The Tribes . . . ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. . . . The Tribes' interests in the waters of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. . . . Moreover, the Indians are entitled "to take their place as independent qualified members of the modern body politic." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369 (1968), *quoting Board of County Commissioners v. Seber*, 318 U.S. 705 (1943). Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

460 U.S. at 614-15. The Court added: "For this reason, the States' reliance on *New Jersey v. New York*, 345 U.S. 369 (1953) (*per curiam*), where the Court denied the City of Philadelphia's request to intervene in that interstate water dispute on the grounds that its interests were adequately represented by the State of Pennsylvania, is misplaced." *Id.* at 615 n.5.

In their briefs, the Proposed Intervenors emphasize that they are native Alaskans. *See* Brief in Support of Motion for Leave to Intervene and File Answer, *supra*, at 1-2. At oral argument, they further suggested that their status as native Alaskans should limit the application of *parens patriae* principles to them. *See* Transcript of Oral Argument on Motion to Intervene at 9, *Alaska v. United States*, No. 128 Orig. (U.S. Sept. 11, 2001).

Even if the Proposed Intervenors' status as native Alaskans made them the equivalent of recognized Indian Tribes, they would still lack a direct interest in the subject matter of the present litigation comparable to the interests of the Tribes that were permitted to intervene in *Arizona v. California*. In that case, the litigation concerned water rights and the intervening Tribes had their own water rights which were being determined in the litigation. *See* 460 U.S. at 615. The present case concerns title to land, and the Proposed Intervenors, as noted earlier, make no claim of title; they argue only

that the Court's determination of which sovereign has title will affect their ability to use the land.

Moreover, as the United States and Alaska both point out, and as the Proposed Intervenors concede, *see* Transcript of Oral Argument on Motion to Intervene, *supra*, at 8-9, the United States has not recognized the Shakan Kwaan Thling-Git Nation or Taanta Kwaan Thling-Git Nation as Indian Tribes. As noted above, a federal regulation lists all recognized Indian Tribes, and it does not include them. *See* 65 Fed. Reg. 13,298. These Nations, moreover, do not have any government-to-government relations with either the United States or the state of Alaska.

The Court's reasoning in *Arizona* should apply only to recognized Indian Tribes. Recognized Tribes "exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). In contrast, although the Proposed Intervenors may have some special rights or privileges because of their status as native Alaskans, they lack sovereignty and therefore should not have a special claim to participation in an inter-sovereign original action. The doctrine of *parens patriae* should apply equally to them as to other citizens. For these reasons, the Proposed Intervenors cannot avail themselves of the special principles applicable to Indian Tribes.

C. *Policy Arguments*

The Supreme Court has not always strictly followed the *parens patriae* principles expressed in *New Jersey v. New York*. On the contrary, it has sometimes allowed private parties to intervene in original actions even though a state or the federal government already may have been representing their interests. For instance, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), eight states initiated an original action against Louisiana, seeking to invalidate a tax imposed on

natural gas brought into the state. The Court allowed seventeen gas pipeline companies to intervene. It explained:

> Given that the Tax is directly imposed on the owner of imported gas and that the pipelines most often own the gas, those companies have a direct stake in this controversy and in the interest of a full exposition of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. See *Oklahoma v. Texas*, 258 U.S. 574 (1922).

451 U.S. at 745 n.21.

Two aspects of this reasoning merit attention. First, the Court did not address the possibility that states or the federal government might be representing the interests of the pipeline companies as *parens patriae*. Second, the Court did not explain why the pipeline companies had a compelling interest in the litigation given that the states also were challenging the Louisiana tax.

These two features of the case suggest that the rules applied in *New Jersey v. New York* are somewhat discretionary in their application. For this reason, even if the Proposed Intervenors cannot show a compelling interest for participating in this action, other considerations might justify their intervention. In this regard, the Proposed Intervenors have raised three substantial arguments.

1. Potential Number of Participants

In *New Jersey v. New York*, the Court was concerned that, if it allowed the City of Philadelphia to intervene, other political subdivisions or even large industrial corporations might want to intervene. *See* 345 U.S. at 373. The Court found this possibility troublesome, saying: "Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions." *Id.* Although the Court did not state the rationale explicitly, it presumably reasoned

that district courts are better equipped to handle complex trial litigation.

The Proposed Intervenors contend that their motion to intervene does not raise this concern. They assert that they are the only persons who wish to engage in subsistence gathering under ANILCA in the area. Accordingly, allowing them to intervene would not open the doors to numerous other parties. *See* Reply Brief in Support of Motion to Intervene and File Answer, *supra*, at 2.

This argument fails for two reasons. First, despite their allegations, whether the Proposed Intervenors are the only persons who might want to intervene remains uncertain. Even if they are the only rural Alaskans who wish to exercise rights under ANILCA in the Tongass National Forest, allowing them to intervene might prompt others to seek leave to participate. ANILCA establishes a priority for taking fish and wildlife. *See* 16 U.S.C. § 3114. To the extent that a ruling for the United States would give the Proposed Intervenors priority, it might diminish the rights of others. Indeed, counsel for Alaska averred at oral argument that commercial fishers are watching this case with interest. *See* Transcript of Oral Argument on Motion to Intervene, *supra*, at 34.

Second, the determination whether Alaska or the United States has title to the property may affect rights beyond those granted under ANILCA. Title to the property may determine the rights of other persons under different state and federal laws. For example, Alaska points out that Article VIII, § 3 of the Alaska Constitution gives all residents certain rights to use State-owned lands and waters. *See* Opposition of Plaintiff State of Alaska to Motion for Leave to Intervene and File Answer at 7, *Alaska v. United States*, No. 128 Orig. (U.S. Apr. 4, 2001). Any number of Alaska residents thus might intervene in support of Alaska's position.

True, at this stage of the litigation, the possibility of additional intervenors remains theoretical. Although others might want to

intervene, no one else has filed any papers. But that was also the situation when the Court denied the City of Philadelphia's motion to intervene in *New Jersey v. New York*. The question the Court considered in that case was whether "there would be [a] practical limitation on the number of citizens . . . who would be entitled to be made parties." 345 U.S. at 373. Here, as in that case, any number of persons might desire to intervene.

2. Burden Imposed on the Litigation

In *Arizona v. California*, when the Court allowed five Indian Tribes to intervene, it noted that the parties opposing intervention had "failed to present any persuasive reason why their interest would be prejudiced or this litigation unduly delayed by the Tribes' presence." 460 U.S. at 615. In this case, the Proposed Intervenors emphasize that they also do not intend to burden the litigation. They represent in their brief that they "do not seek to bring new claims or issues against the state or the federal government." Motion for Leave to Intervene and File Answer, *supra*, at 7.

Neither the United States nor Alaska have identified specific problems that intervention might cause in this case. Alaska, however, contends the intervenors are inherently burdensome. Even if the schedule for the litigation does not change, Alaska suggests that the addition of another party will necessarily complicate the proceedings. Moreover, so long as the Proposed Intervenors are not attempting to raise new and different arguments, neither they nor the Court can expect to gain much from their participation.

In an often cited passage from *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972 (D. Mass. 1943), Judge Wyzanski expressed similar concerns and advocated participation as *amicus curiae* an alternative to intervention:

> It is easy enough to see what are the arguments against intervention where, as here the intervenor merely underlines

> issues of law already raised by the primary parties. Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.

Id. at 973.

For these reasons, the possibility that the Proposed Intervenors might impose only a limited burden on the proceedings is not a strong argument for intervention. The Proposed Intervenors, however, may participate as *amicus curiae*.[6] The United States and Alaska both have said that they do not in general object to this participation.

3. Fairness

The Proposed Intervenors also argue that the entire history of their efforts to regain permission to harvest roe on kelp makes denying intervention unfair. They emphasize that they have litigated their rights under ANILCA with the United States for almost ten years, only to have the case stayed when Alaska filed this original action. Without intervention, they cannot participate here. Making matters worse, they fear that the United States will settle with Alaska, thus preventing any court from ever ruling on their arguments.

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[6]The Proposed Intervenors have not asked to participate in this case as *amicus curiae*, but have indicated that they may make this request in the future. *See* Transcript of Oral Argument on Motion to Intervene, *supra*, at 27. The Special Master believes that the Proposed Intervenors have demonstrated sufficient interest to participate as *amicus curiae*, and will decide questions that may arise about the details of their possible participation by future order, should such a request be made.

The personal circumstances of the Proposed Intervenors and the nature of their interests contributes to the sense of unfairness. The Proposed Intervenors are neither numerous nor wealthy. This litigation concerns an issue whose resolution may affect their right to continue subsistence gathering and customary trade as their ancestors did since time immemorial. If the Court rules in favor of Alaska on the issue of title, the Proposed Intervenors apparently cannot gather herring roe under applicable Alaska law. Denying them power to intervene would sweep them aside entirely, trusting only their former opponent in litigation, the United States, to represent their position.

Without denying the validity of any of these points, three factors put into perspective the seeming hardship of denying intervention to the Proposed Intervenors. First, *parens patriae* principles regularly produce this type of hardship because they presume that a state or the United States may speak for all citizens, even though the citizens may disagree with each other or may have special concerns. These principles, however, have an important justification. In our democratic society citizens empower governmental officials to represent their interests and are bound by their actions on behalf of all citizens.

Second, similar types of unfairness often arise when citizens deal with sovereign parties. For example, as a general rule, private parties may not estop the government. *See Heckler v. Community Health Services of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984). This rule may cause individuals who have relied on what the government has done in the past to bear a disproportionate burden when the government changes positions. Yet, their individual interests cannot bar the government from taking actions that may benefit the citizenry as a whole and that the present representatives choose to pursue.

Third, as explained previously, *see supra* n.6, the Proposed Intervenors may choose to participate in the role of *amicus curiae*. This is not a perfect substitute for participating as a party. Yet, to the

extent that the Proposed Intervenors avail themselves of this opportunity, they can make the legal arguments that they want.

Accordingly, even though the Proposed Intervenors justly may feel unfortunate, the circumstances do not suffice to require intervention. The representatives of the United States have the power to decide what arguments the United States will offer in contesting Alaska's claim to the submerged land.

VI. Federal Rule of Civil Procedure 24

The Proposed Intervenors rely heavily in their briefs on Federal Rule of Civil Procedure 24(a) and (b).[7] This Rule governs motions to

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[7]Rule 24(a) provides for "Intervention as of Right" as follows: "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

Rule 24(b) specifies the following rule for "Permissive Intervention": "Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

intervene in federal district court actions. The Proposed Intervenors have discussed the elements of the Rule at length, and cited many lower court decisions interpreting the Rule.

Rule 24 does not alter the conclusion that the Supreme Court should deny intervention in this action based on *parens patriae* principles. The Supreme Court does not necessarily follow Rule 24 when ruling on motions to intervene in original actions. Indeed, under Supreme Court Rule 17.2, the Federal Rules of Civil Procedure serve only "as guides" in original jurisdiction cases and the Court specifically has identified Rule 24 as one that serves merely as a guide without controlling force. *See Arizona v. California*, 460 U.S. 605, 614 (1983). Accordingly, the principles articulated in *New Jersey v. New York* and the other decisions cited above take precedence over the text of Rule 24 and any lower court interpretations of the provision.[8]

Rule 24(b).

[8]Even if Rule 24 directly applied to this action, the Special Master would, nonetheless, recommend the same result. Under Rule 24(b), *parens patriae* principles would provide reason for denying permissive intervention. In addition, the Special Master is persuaded by the reasoning of the many federal courts that have considered *parens patriae* principles when ruling on motions to intervene as of right under Rule 24(a). Although these courts have not applied the same rules that the Supreme Court uses in original actions, they have held applicants to a higher standard on the issue of adequacy of representation when they seek to intervene on the same side as a governmental entity. *See, e.g., Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. 1996); *Environmental Defense Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979); 7C Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure § 1909 (1986 & Supp. 2000). *But see Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999) (rejecting this approach).

VII. Assessment of Costs

In their supplemental briefs, the parties and the Proposed Intervenors addressed the Proposed Intervenors' responsibility for paying a portion of the Special Master's future fees and expenses. The United States and Alaska each have argued that, if the Court permits intervention, the Proposed Intervenors should pay a substantial portion of the fees. In contrast, citing financial hardship, the Proposed Intervenors have requested that their financial responsibility be limited to their own out-of-pocket expenses.

If the Court agrees with the recommendation of this report, and decides not to permit intervention, then it need not address the issue of what costs the Proposed Intervenors would have to pay once they became parties. If the Court disagrees and permits intervention, the responsibility of the Proposed Intervenors to pay the Special Master's fees and expenses may depend on the scope of the permitted intervention. Prior to knowing what role the Proposed Intervenors might play in this litigation if allowed to participate, a recommendation regarding responsibility for fees and expenses would be premature.

The Special Master has incurred fees and expenses in preparing this report on the motion to intervene. One issue raised at oral argument was whether the Proposed Intervenors have any responsibility for these costs. Although the Court sometimes has ordered non-parties to pay a portion of a special master's fees and expenses, *see, e.g., Nebraska v. Wyoming*, 504 U.S. 982 (1992) (assessing costs on *amici curiae* who did not object), neither the United States nor Alaska has asked for such an assessment in this case. Accordingly, the Proposed Intervenors should not have responsibility for the costs of resolving this motion.

VIII. Conclusion

For the foregoing reasons, the Special Master recommends denying the Proposed Intervenors' motion to intervene. Unless otherwised directed by the Court, the proceedings in this action will continue, without a stay, pending the Supreme Court's action on this report.[9]

Respectfully submitted,

GREGORY E. MAGGS
Special Master

Washington, D.C.
November 26, 2001

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[9]The Supreme Court Rules do not establish a time limit for filing exceptions to the report of a special master. Instead, the Supreme Court typically specifies the time limit by order upon receiving the special master's report. *See, e.g., Kansas v. Colorado*, 531 U.S. 921 (2000).

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NO. 128, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

STATE OF ALASKA,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

REPORT OF THE SPECIAL MASTER ON SIX MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND ONE MOTION FOR CONFIRMATION OF A DISCLAIMER OF TITLE

GREGORY E. MAGGS
Special Master
Washington, D.C.

March 2004

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I. INTRODUCTION

This report concerns an original action brought by the State of Alaska against the United States to quiet title to submerged lands in the area of Southeast Alaska. Alaska's amended complaint includes four counts. Alaska has moved for partial summary judgment on counts I, II, and III, and the United States has moved for summary judgment on counts I, II, and IV. The United States also has moved for confirmation of a disclaimer of title with respect to lands at issue in count III.

This report recommends that the Supreme Court (1) grant summary judgment to the United States on counts I, II, and IV; (2) deny summary judgment to Alaska on counts I and II; (3) confirm the United States' proposed disclaimer; (4) dismiss count III for lack of jurisdiction; (5) dismiss Alaska's motion for summary judgment on count III as moot; and (6) order that Alaska take nothing on counts I, II, and IV of its amended complaint. These recommendations, if adopted, will end this litigation.

A. Procedure

On June 12, 2000, the Court granted the State of Alaska leave to file a bill of complaint against the United States. *See Alaska v. United States*, 530 U.S. 1228 (2000). Alaska's complaint asks the Court to quiet title to vast expanses of marine submerged lands under the authority of 28 U.S.C.

§ 2409a(a) (2000), a provision of the Quiet Title Act of 1972.[1] The submerged lands are located in the area of Southeast Alaska's Alexander Archipelago. This area includes over 1000 islands and is larger than many states. It extends about 500 miles from north to south and 100 miles from east to west, making this case one of the largest quiet title actions ever litigated. The dispute involves a geographical area that is different from those areas at issue in previous submerged lands cases involving the United States and Alaska.[2]

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[1]Under 28 U.S.C. § 2409a(a), the United States "may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest." In *California v. Arizona*, 440 U.S. 59, 64-65 (1979), the Court held that § 2409a(a) waives the United States' sovereign immunity in quiet title actions. Another statutory provision, 28 U.S.C. § 1346(f) (2000), provides that "[t]he district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." The Court has held that § 1346(f) does not divest the Court of jurisdiction over quiet title actions under § 2409a(a) otherwise within its original jurisdiction. *See California v. Arizona*, 440 U.S. at 66-68.

[2]*See United States v. Alaska*, 521 U.S. 1 (1997) [hereinafter *Alaska (Arctic Coast)*] (concerning submerged lands along the Arctic Coast of Alaska); *United States v. Alaska*, 503 U.S. 569 (1992) [hereinafter *Alaska (Norton Sound)*] (concerning submerged lands in Norton Sound near the city of Nome); *United States v. Alaska*, 422 U.S. 184 (1975) [hereinafter *Alaska (Cook Inlet)*] (concerning submerged lands in Cook Inlet). Alaska has a longer shoreline,

Alaska's claims rest on the Equal Footing doctrine and the Submerged Lands Act of 1953, 67 Stat. 29 (codified as amended at 43 U.S.C. §§ 1301-1315 (2000)). The Equal Footing doctrine says that new states enter the Union having the same sovereign powers and jurisdiction as the original thirteen states. *See Coyle v. Smith*, 221 U.S. 559, 572-73 (1911); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Under this doctrine, a new state generally acquires title to the beds of inland navigable waters. *See Alaska (Arctic Coast)*, 521 U.S. at 5. The Submerged Lands Act of 1953 declares that states generally have title to all lands beneath inland navigable waters and beneath offshore marine waters within their "boundaries." 43 U.S.C. § 1311(a). A state's boundaries under the Act generally extend three geographical (*i.e.*, nautical) miles[3] from the coast line. *See id.* § 1301(b). Under both the Equal Footing doctrine and the Submerged Lands Act, the United States may prevent title to submerged lands from passing to a state at statehood by expressly retaining title to the lands. *See id.* § 1313(a); *Alaska (Arctic Coast)*, 521 U.S. at 35.

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including the shoreline of islands, than the entire rest of the United States. Perhaps for this reason, Alaska has become involved in more disputes over submerged lands than other states.

[3]A "geographical" or "nautical" mile (also sometimes called a "geographic" or "sea" mile) equals approximately 1.15 "statute" miles (also called "English" or "land" miles). Three nautical miles equals one marine league. *See United States v. California*, 381 U.S. 139, 180 n.4 (1965).

Alaska's amended complaint states four counts. *See* Amended Complaint to Quiet Title, *Alaska v. United States* (U.S. Dec. 14, 2000) (No. 128, Orig.); *Alaska v. United States*, 531 U.S. 1066 (2001) (granting leave to amend complaint). Count I alleges that the waters of the Alexander Archipelago are inland waters because they have been historically treated as inland waters. *See* Amended Complaint to Quiet Title, *supra*, ¶¶ 7-9. Count II alleges that the waters also qualify as inland waters because they lie within several juridical bays defined by the Alexander Archipelago's geographic features. *See id.* ¶ 25. As described more fully below, these counts claim that certain submerged lands located within these alleged inland waters, or within three nautical miles seaward of the limits of these alleged inland waters, passed tc the State under the Equal Footing doctrine and Submerged Lands Act. *See* Amended Complaint to Quiet Title, *supra*, ¶¶ 15, 38.

Counts III and IV concern the possibility that the United States may have retained title to some of the submerged lands at issue and thus prevented them from passing to Alaska under the Equal Footing doctrine and the Submerged Lands Act. In count III, Alaska claims that the United States did not reserve or retain submerged lands located within the boundaries of the Tongass National Forest. *See* Amended Complaint to Quiet Title, *supra*, ¶ 44. In count IV, Alaska claims that the United States did not reserve or retain submerged lands located within the boundaries of the Glacier Bay National Monument (an area later expanded and now called the Glacier Bay National Park and Glacier Bay National Preserve). *See id.* ¶¶ 59-61.

On July 24, 2002, the parties filed six motions for partial summary judgment. Alaska asked for summary judgment on

counts I, II, and III, and the United States asked for summary judgment on counts I, II, and IV. On February 3 and 4, 2003, the Special Master heard oral argument on counts I, II, and IV. The Special Master stayed oral argument on count III because the United States announced its intention to disclaim ownership of certain submerged lands claimed by Alaska. On May 30, 2003, the United States filed an unopposed motion for confirmation of a proposed disclaimer and the dismissal of count III. *See infra* Appendix A (proposed disclaimer).

The Court now has before it the questions of whether to grant summary judgment on counts I, II, and IV and whether to confirm the United States' proposed disclaimer of title and dismiss count III. The Special Master recommends that the Court grant summary judgment to the United States on counts I, II, and IV, deny summary judgment to Alaska on counts I and II, confirm the United States' proposed disclaimer, and dismiss count III for lack of jurisdiction.

B. Terminology and Basic Principles

The law governing Alaska's claims comes mostly from Supreme Court precedents, the Submerged Lands Act, and a multilateral treaty called the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639 [hereinafter Convention] (Exhibit US-I-7).[4] These sources of law employ a number of technical terms that require some initial explanation.

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[4]The United States signed the Convention on April 29, 1958, and the Convention entered into force on September 10, 1964. A portion of the Convention appears in Appendix B below.

The Convention uses the word "baseline" to refer to what United States courts and statutes typically call the "coastline" or "coast line." *See Alaska (Arctic Coast)*, 521 U.S. at 8; Submerged Lands Act, 43 U.S.C. § 1301(c). The baseline or coast line generally follows the "low-water line along the coast." Convention, *supra*, art. (3). *See also* 43 U.S.C. § 1301(c). In special circumstances, as discussed at considerable length in this report, the baseline may cross over the mouths of bays or rivers or may run from island to island in areas where a group of islands fringes the mainland. *See Alaska (Arctic Coast)*, 521 U.S. at 8, 11. In these special circumstances, the baseline is called a "closing line." *Id.* at 11.

The term "internal waters" under the Convention is synonymous with what courts in the United States have traditionally called "inland waters." *See United States v. California*, 382 U.S. 448, 450 (1966) (per curiam). Internal waters include all waters "on the landward side of the baseline," such as rivers, lakes, and bays. *See* Convention, *supra*, art. 5(1). The Convention contains a complicated geographic definition of a "bay." *See id.* art. 7(2)-(5) (reprinted below in Appendix B). The Court generally calls bays meeting this geographic definition "juridical bays." *See United States v. Maine*, 475 U.S. 89, 94 (1987) [hereinafter *Maine (Nantucket Sound)*]. The Convention also recognizes "historic bays," which are areas of water that may not meet the geographic definition of a bay but which have been historically treated like the internal waters of a bay. *See* Convention, *supra*, art. 7(6). The Court sometimes refers to historic bays as "historic inland waters" or "historic waters," perhaps to emphasize that they may not satisfy the geographic definition of a bay. *See Alaska (Arctic Coast)*, 521 U.S. at 11;

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11, 75 & n.100 (1969).

A nation has complete sovereignty over its internal waters. *See Louisiana Boundary Case*, 394 U.S. at 22. The nation may regulate all activities within internal waters, and may exclude foreign vessels from passing through internal waters or even entering them. For example, absent a treaty to the contrary, the United States could exclude foreign ships from entering the Mississippi River or San Francisco Bay.

The term "territorial sea" under the Convention refers to what United States courts have traditionally called the "marginal sea." *See United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 513 (1985); *Louisiana Boundary Case*, 394 U.S. at 22. The territorial sea consists of waters lying immediately seaward of the baseline. *See* Convention, *supra*, art. 6. The Convention does not specify the breadth of the territorial sea. Prior to 1988, the United States generally took the position that its territorial sea had a breadth of three nautical miles. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 n.8 (1989). Since 1988, however, the United States has claimed a territorial sea of twelve nautical miles. *See* Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

The United States uses the "envelope of arcs of circles" method to determine the outer limits of its territorial sea. This method requires drawing arcs on a chart of the coast line from every point along the coast line. Each arc has a radius equal to the breath of the territorial sea (formerly three nautical miles, now twelve nautical miles). As the arcs partially overlap each other, the outermost arc segments define the limits of the

territorial sea. *See* G. Etzel Pearcy, *Measurement of the U.S. Territorial Sea*, 40 Dep't of State Bull. 963, 964 & fig. 1 (1959) (describing and illustrating the envelope of arcs of circles method) (Exhibit AK-102).

A coastal nation has sovereignty over its territorial sea. *See* Convention, *supra*, art. 1. Accordingly, within its territorial sea, a nation may exercise extensive control over the activities of foreign vessels. *See Louisiana Boundary Case*, 394 U.S. at 22. The nation, however, may not prevent foreign vessels from making "innocent passage" (sometimes called "free passage") through the territorial sea. *See id.*; Convention, *supra*, art. 19(1). The Convention explains that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." *Id.* art. 14(4). For example, the United States might regulate fishing by foreign vessels in the territorial sea off the West Coast, but it could not bar foreign vessels from merely traveling through the territorial sea when sailing between Mexico and Canada.

Some older documents cited by the parties in this case use the term "territorial waters." This term may refer to the territorial sea, to internal waters, or to both depending on context. *See* 3 *Acts of the Conference for the Codification of International Law* 195, League of Nations Doc. C.351(b) M.145(b) (1930) (Exhibit AK-91) ("under American laws and regulations the expression 'territorial waters of the United States' includes other waters than those of marginal sea, for example, ports, harbours, bays, and other enclosed arms of the sea, as well as boundary waters."); 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 317 (1962) (Exhibit AK-311) (glossary entry for "territorial waters" says: "Includes the territorial sea (marginal sea) and the inland waters of a country (lakes, rivers, bays, etc.). Sometimes used as synonymous with Territorial Sea.").

"High seas" are waters lying seaward of the limits of the territorial sea. *See* Convention, *supra*, art. 24(1). Traditionally, coastal nations had little power to regulate the conduct of foreign vessels on the high seas. *See Louisiana Boundary Case*, 394 U.S. at 23. The Convention, however, allows a coastal nation to exercise the control necessary to prevent "infringement of its customs, fiscal, immigration, or sanitary regulations" within a "contiguous zone" that may extend up to "twelve miles from the baseline from which the territorial sea is measured." Convention, *supra*, arts. 24(1)(a), 24(2). The United States currently claims a contiguous zone that extends an additional twelve miles beyond its territorial sea. *See* Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999). The United States also claims a jurisdiction to regulate fishing within a 200-mile "Exclusive Economic Zone." Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (proclaiming the existence of this zone); 16 U.S.C. §§ 1802(11), 1811(a) (2000) (implementing this proclamation).

II. HISTORIC INLAND WATERS (Count I)

Count 1 of Alaska's amended complaint alleges that the waters of the Alexander Archipelago are historic inland waters. Both Alaska and the United States have moved for summary judgment on this count. For the reasons stated below, the Special Master recommends that the Court grant the United States' motion and deny Alaska's motion.

A. Overview

Appendix C contains a map of Southeast Alaska. The area depicted consists of numerous islands forming Alaska's Alexander Archipelago and a long strip of the Alaska mainland. On the map, a dark border surrounds the western side of the Archipelago. This dark border is a graphic representation of a collection of closing lines described by the United States in an arbitration with Britain known as the "1903 Alaska Boundary Tribunal." *See infra* part II.C.3 (discussing this arbitration at length).

In count I, Alaska seeks to quiet title to certain "pockets and enclaves" of submerged lands. These pockets and enclaves include submerged lands (marked in red on the map in Appendix C) lying landward of the 1903 closing lines but more than three nautical miles from the shores of the mainland and any island. *See* Amended Complaint to Quiet Title, *supra*, ¶ 7 & Exh. 1. The pockets and enclaves also include submerged lands (marked in dark blue on the map in Appendix C) situated in areas extending three nautical miles seaward of the 1903 closing lines but more than three nautical miles from the shores of the mainland or any islands. *See id.* ¶ 14 & Exh. 1. The United States estimates that, altogether, the pockets and

enclaves have a total area of approximately 777 square miles.[5] *See* U.S. Count I Memorandum at 2.

Alaska's claim that it now has title to these pockets and enclaves of submerged lands rests on the theory that waters landward of the 1903 closing lines are historic inland waters. *See* Amended Complaint to Quiet Title, *supra*, at ¶¶ 7-9. The Court has considered claims of this kind in a number of lawsuits. It has decided two cases concerning claims of historic waters off other portions of Alaska's coast. In 1975, the Court held that Cook Inlet, a 150-mile long indentation into the Alaskan coast leading to the city of Anchorage, is not a historic bay. *See Alaska (Cook Inlet)*, 422 U.S. at 188-204. In 1997, the Court similarly said (and Alaska conceded) that Stefansson Sound, an area of water lying off Alaska's Arctic Coast, is not a historic bay. *See Alaska (Arctic Coast)*, 521 U.S. at 11. Other

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[5]While count I and count II address only these relatively small pockets and enclaves of submerged lands, counts III and IV together concern title to submerged lands that lie or may lie within the boundaries of the Glacier Bay National Monument and Tongass National Forest. Together, the Glacier Bay National Monument and the Tongass National Forest cover almost the entire area of the Alexander Archipelago, putting at issue title to more than 10,000 square nautical miles of submerged land. *See* Exhibit AK-160 (approximate acreage calculations for water areas in the northern and southern parts of the Alexander Archipelago, subject to various qualifications).

cases have addressed historic waters claims relating to the coast of California,[6] Florida,[7] Louisiana,[8] Massachu-

[6]In 1964, the Court held that six bays and indentations off the California coast are not historic inland waters. These included: (1) the indentation from Point Conception to Point Hueneme; (2) San Pedro Bay; (3) the indentation from the southern extremity of San Pedro Bay to the western headland at Newport Bay; (4) Crescent City Bay; (5) San Luis Obispo Bay; and (6) Santa Monica Bay. *See California*, 381 U.S. at 143 n.3, 172-175. Special Master William H. Davis also had determined that Monterey Bay is not a historic bay, but the Court did not reach the issue because it held that Monterey Bay constitutes a juridical bay under the Convention. *See id.* at 173.

[7]In 1973, Special Master Albert B. Maris concluded that an area of the Gulf of Mexico southeast of a line from the Dry Tortugas to Cape Romano is not a historic bay. *See* Report of Albert B. Maris, Special Master at 46, *United States v. Florida* (U.S. Dec. 1973) (No. 52, Orig.) [hereinafter Florida Report]. All of the reports of special masters cited in this report, except the report in No. 84, Original, *Alaska (Arctic Coast)*, are collected in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (Michael W. Reed *et al.*, eds. 1991).

[8]In 1974, Special Master Walter P. Armstrong, Jr., rejected Louisiana's claim that waters of the Mississippi River Delta, including Caillou Bay and East Bay, are historic inland waters. *See* Report of Walter P. Armstrong, Jr., Special Master at 13-22, *United States v. Louisiana* (U.S. July 31, 1974) (No. 9, Orig.) [hereinafter Louisiana Report]. The Court overruled Louisiana's exceptions without opinion. *See United States v. Louisiana*, 420 U.S. 529 (1975).

setts,[9] Mississippi,[10] New York,[11] and Rhode Island.[12] The Court also has observed that the United States claims Chesapeake Bay and Delaware Bay as historic inland waters. *See Alaska (Cook Inlet)*, 422 U.S. at 186 n.1.

The Convention recognizes the existence of historic inland waters, but does not specify the criteria for identifying them. *See* Convention, *supra*, art. 6(1). In its precedents, however, the Court has stated the following test for historic inland water claims:

> [W]here a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done

[9]In 1986, the Court held that Nantucket Sound did not constitute inland waters under a theory of "ancient title," a proposed variant on historic title. *See Maine (Nantucket Sound)*, 475 U.S. at 105. The United States acknowledged that Vineyard Sound is a historic bay. *See id.* at 91.

[10]In 1985, the Court held that Mississippi Sound is a historic bay. *See United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 101-15 (1985).

[11]The United States acknowledged that Long Island Sound is a historic bay. *See Rhode Island and New York Boundary Case*, 469 U.S. at 509.

[12]Special Master Walter E. Hoffman concluded that Block Island Sound is not a historic bay. *See id.* at 509 n.5.

so continuously; and (3) has done so with the acquiescence of foreign nations.

Alaska (Arctic Coast), 521 U.S. at 11 (citation omitted). "For this showing," the Court has elaborated, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska (Cook Inlet)*, 422 U.S. at 197. The Court also has considered the "vital interests of the United States" in designating waters as historic inland waters. *Alabama and Mississippi Boundary Case*, 470 U.S. at 103.

In this case, Alaska seeks to demonstrate on the basis of proffered historical documents that the waters landward of the 1903 closing lines meet these requirements for historic inland waters. As discussed in detail below, Alaska alleges that the United States and Russia in the past treated these waters as inland waters by asserting the right to exclude foreign vessels from them. Alaska further alleges that assertion of this right to exclude foreign vessels was continuous from the early 1800s until the 1970s; that Britain, Canada, and other nations have acquiesced in the assertion of this right; and that the vital interests of the United States support treating the waters of the Alexander Archipelago as historic inland waters.

The United States argues that the documents do not show that the waters of the Alexander Archipelago are historic inland waters. It contends that, prior to Alaska's statehood, the waters lying within three miles of the shores of the mainland and the islands of the Archipelago were recognized as territorial sea. It says that waters lying more than three miles from the shore, including the waters overlying the pockets and enclaves of submerged lands at issue in count I, were considered high seas.

The United States maintains that it has not asserted the right to exclude foreign vessels from making innocent passage through these waters and that Russia generally did not assert this right before ceding Alaska to the United States in 1867. The United States also contends that Alaska cannot show a continuous assertion of authority over the waters or any kind of foreign acquiescence. Finally, the United States argues that recognizing the waters of the Alexander Archipelago as historic inland waters would not serve the vital interests of the Nation.

If Alaska is correct that waters lying landward of the 1903 closing lines are historic inland waters, then these closing lines would mark the State's "coast line" under the Submerged Lands Act. *See* 43 U.S.C. § 1301(c) (defining the coast line to follow the "line marking the seaward limit of inland waters"). Alaska's "boundaries" then would extend three nautical miles seaward from this coast line. *Id.* § 1301(b) (generally defining a state's boundaries to extend three geographical miles seaward from the coast line). Under the Submerged Lands Act and Equal Footing Doctrine, Alaska would have title to all unretained submerged lands lying within these boundaries.[13] *See*

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[13]The United States may prevent a state from acquiring title to submerged lands under either the Submerged Lands Act or the Equal Footing Doctrine by retaining title to the lands at the time of statehood. *See* 43 U.S.C. § 1313(a) (creating an exception for "all lands expressly retained by or ceded to the United States"); *Alaska (Arctic Coast)*, 521 U.S. at 34 (recognizing the same exception under the Equal Footing Doctrine). Counts III and IV address the question whether the United States retained submerged lands located within the Tongass National Forest or the Glacier Bay National Monument.

id. § 1311(a) (states have title to all submerged lands within their "boundaries"); *Alaska (Arctic Coast)*, 521 U.S. at 6 (Equal Footing doctrine independently grants states title to those submerged lands lying beneath inland navigable waters). The State's title would include all of the unreserved pockets and enclaves of submerged land at issue in this case because the pockets and enclaves all lie within these boundaries.

On the other hand, if the United States is correct that the waters landward of the 1903 closing lines are not inland waters, then the shores of the mainland and the islands in the Alexander Archipelago generally would mark Alaska's coast line. *See* 43 U.S.C. § 1301(c) (defining the coast line to follow "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea" where there are no inland waters). The State's boundaries then would extend three nautical miles from these shores. *See id.* § 1301(b). Although Alaska would have title to all unretained submerged lands within these boundaries, *see id.* § 1311(a), it would not have title to the pockets and enclaves of submerged lands at issue in this count. The pockets and enclaves lie more than three nautical miles from the shores of the mainland and islands, and thus would be located outside the State's boundaries.

Three additional points require mention. First, if Alaska does not have title to the pockets and enclaves of submerged lands at issue in this case, the United States would appear to hold the lands "for the public." *Id.* § 1332(3) (federal government holds the "outer Continental Shelf" for the public); *id.*

See infra parts IV & V.

§ 1331(a) ("outer Continental Shelf" includes submerged lands lying seaward of navigable waters). The United States, however, has not filed a counterclaim seeking title or other rights.

Second, this case might influence future identification of the baseline of the United States under the Convention. If the waters lying landward of the 1903 closing lines are historic inland waters, then these lines likely will mark the baseline. *See* Convention, *supra*, art. 7(6) (recognizing historic bays). On the other hand, if the waters of the Alexander Archipelago are not inland waters, then the baseline presumably will follow the shores of the mainland and the islands. *See id.* art. 3 (baseline follows "the low water line along the coast"). The Court, however, has recognized that variations may exist in the international and federal-state boundaries. *See Alaska (Arctic Coast)*, 503 U.S. at 588 n.11.

Third, if this case influences the identification of the baseline of the United States, it also would affect the character of the waters of the Alexander Archipelago. If Alaska prevails, all waters landward of the 1903 closing lines presumably would be inland waters subject to complete domestic sovereignty. On the other hand, if the United States prevails, these waters generally would be part of the territorial sea of the United States, and the United States and Alaska's authority over them would be limited accordingly.

B. Appropriateness of Summary Judgment

Count I requires the Court to determine the answers to several factual questions. As mentioned briefly above, these questions include (1) whether the United States and Russia historically asserted the right to exclude foreign vessels from

the waters of the Alexander Archipelago; (2) whether they asserted this right continuously; (3) whether they asserted it with the acquiescence of foreign nations; and (4) whether the vital interests of the United States support designating the waters as historic inland waters. *See Alaska (Arctic Coast)*, 521 U.S. at 11; *Alabama and Mississippi Boundary Case*, 470 U.S. at 103. In an effort to prove their respective positions on these questions, the parties have submitted many thick binders of documents as exhibits to their motions for summary judgment.

The numerous exhibits provide information about dozens of incidents in the waters' history. The exhibits include international treaties, statements made before international tribunals or in the course of international negotiations, and reports detailing the experiences of mariners plying the waters in the nineteenth and twentieth centuries. The exhibits also include historical accounts of the practices of Russia prior to its cession of Alaska to the United States in 1867, congressional reports and other documents, agency regulations, letters and memoranda of executive branch officials, geographical charts, and magazine articles. The documents come from many parts of the world over a 150-year period. The parties appear to have collected every kind of statement, in every possible form, regarding the historic status of the waters at issue.

Some agreement exists with respect to these exhibits. The parties do not dispute the text and other content of any of the documents presented. In addition, neither side has challenged any document's authenticity. The parties also assume that all

of the documents would be admissible as evidence if this case came to trial.[14]

The parties, however, also have strong disagreements about the exhibits. As described at length in part II.C immediately below, they vigorously dispute the meaning and import of nearly every document. Moreover, as explained in part II.D below, they also disagree about whether the exhibits as a whole prove the elements of Alaska's historic inland waters claim. Alaska contends that the exhibits answer the pertinent factual questions in its favor, while the United States of course asserts that they do not.

Despite these genuine disagreements, both parties have moved for summary judgment on count I. Their motions raise an important initial question about the appropriateness of resolving this case without a trial. A court generally cannot grant summary judgment unless the whole record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.

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[14]Much of the information presented by Alaska goes beyond what Alaska alleged in its amended complaint. Although a complaint need not plead all of a party's evidence, the United States objects that Alaska previously contended that the allegations in its complaint provided the basis for its legal claim. *See* U.S. Count I Reply at 5 (citing Alaska's Brief in Support of Motion for Leave to File a Complaint at 12-16, *Alaska v. United States* (U.S. Nov. 24, 1999) (No. 128, Orig.)). The United States, however, has not asked the Special Master to ignore any of the State's factual allegations. The Special Master therefore has considered all of the documents presented by Alaska.

R. Civ. P. 56(c). A substantial issue, therefore, is whether the parties' contrary views of the documentary evidence preclude summary judgment.

Having examined the record as whole, the Special Master concludes that summary judgment is an appropriate mechanism for resolving count I for three reasons. First, on nearly every relevant point, the parties do not dispute the material, historical facts. Rather, where disagreements exist, the parties generally contest the significance or proper interpretation of undisputed facts from the long history of the Alexander Archipelago's waters. To mention just one example, the parties fully agree that, in October 1880, the Commander of the *U.S.S. Jamestown* issued a report to the Secretary of the Navy that referred to certain "inland waters." *See infra* part II.C.2.c.(2). They disagree only about how to understand this report, disputing whether the report shows that federal officials recognized the waters of the Alexander Archipelago as inland waters in the legal sense, or whether the report used the term "inland waters" in a colloquial, non-legal sense to describe physically sheltered waters without concern for their legal status. Where the parties agree as to the historical facts but dispute their legal significance, "the controversy collapses into a question of law suitable to disposition on summary judgment." *Thrifty Oil Co. v. Bank of America Nat'l Trust & Savs. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2002) (citations omitted).

Second, even on the few points as to which a factual dispute appears to exist, a closer look reveals that the problem is simply that the available historical evidence is less than complete and that the parties' dispute is still really over the interpretation of the available undisputed facts. For example, the parties discuss

an incident in which the United States Coast Guard, in 1924, seized the schooner *Marguerite* for violating the Alien Fishing Act. *See infra* part II.C.4.b.(1). The record leaves unclear exactly where the seizure occurred, and particularly whether at the moment of seizure the schooner was located more than three miles from any shore. That parties, however, do not dispute available historical facts about this 79-year-old incident.[15] They both cite and rely on the same written sources regarding the event. They merely dispute the best interpretation of these sources.

Third, the numerous binders of exhibits making up the record appear to include all of the evidence that the parties have been able to compile with regard to count I.[16] If a trial were held, the parties would present this same documentary evidence to the same decision maker. A trial therefore would serve little, if any, purpose. In this situation, the count is best resolved on

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[15] As counsel for Alaska observed at oral argument: "There are no material disagreements and with due respect to United States' counsel we believe on certain issues that they simply are not properly interpreting the historical record. . . . [T]he position of the MARGUERITE . . . [is] undisputed as a matter of the historical record." Tr. of Oral Arg. 23-24 (Feb. 3, 2003). "There is a dispute about assertions. We believe that the factual record is undisputed." *Id.* at 37.

[16] As counsel for the United States remarked at the oral argument on count I, the uncertainties in the case are "not unknowns that can be resolved by a trial, unfortunately. . . . [T]he Master has everything before him that . . . counsel have been able to come up with." *Id.* at 66-67.

the parties' motions for summary judgment. *See Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991) ("'If decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved.'" (quoting *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978)); *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 684 (9th Cir. 1990) ("[W]here the ultimate fact in dispute is destined for decision by the court rather than by a jury, there is no reason why the court and the parties should go through the motions of a trial if the court will eventually end up deciding on the same record.").[11]

[11] At the very close of oral argument, counsel for Alaska did assert that, if summary judgment were not granted to Alaska, factual disputes would preclude the granting of summary judgment to the United States on count I. *See* Tr. of Oral Arg. 99, 106-107 (Feb. 4, 2003). Alaska's written submissions and the great bulk of Alaska's oral argument do not support this assertion. Alaska specifically said that there are "no material disagreements" between the parties, Tr. of Oral Arg. 23 (Feb. 3, 2003), and that such disputes as exist are disputes about "properly interpreting the historical record," *id.*, or "over the interpretation of the evidence," *id.* at 53. The Special Master respectfully concludes that Alaska's closing assertion was simply a fallback attempt to keep the case alive if the alternative would be to lose on summary judgment. A trial would serve no purpose because the Special Master already has before him all of the materials that the parties would submit as evidence.

C. Documents Submitted and Their Interpretation

The facts relevant to count I begin in the 1820s when Russia had sovereignty over Alaska. They extend through the cession of Alaska to the United States in 1867 and continue to Alaska's statehood in 1959. The facts end in the 1970s after the United States made international representations concerning Alaska's coast line. As described above, evidence of these facts comes from a wide variety of documents that the parties have submitted as exhibits to their summary judgment motions.

This portion of the report describes the documents presented by the parties. It also explains and resolves the parties' numerous and often substantial disagreements about the interpretation of these documents. Part II.D, which follows, then addresses the separate legal question of whether the record of all the documents, as they are individually interpreted here, suffices to establish either party's entitlement to summary judgment.

The Special Master regrets the lengthiness of the ensuing summary and analysis of the documents submitted as evidence. However, given the large volume of materials and the parties' extensive arguments about their interpretation, the Special Master sees no abbreviated alternative.

1. Period of 1821-1867

Russia had sovereignty over Alaska before the United States purchased the territory in 1867. *See* Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of all the Russias to the United States of

America, 15 Stat. 539 (1867). The Court addressed Russia's transfer of Alaska to the United States when the Court considered Alaska's claim to submerged lands within Cook Inlet. *See Alaska (Cook Inlet)*, 422 U.S. at 192 n.13. The Court held that, when Russia ceded Alaska to the United States, "[t]he cession was effectively a quitclaim." *Id.* Accordingly, the Court said, "the United States thereby acquired whatever dominion Russia had possessed." *Id.* § 2. Russia's assertion of sovereignty over the waters of the Alexander Archipelago therefore has relevance to Alaska's claim that these waters are historic inland waters.

a. The Russian Imperial Ukase

In 1821, Czar Alexander I of Russia received reports of "secret and illicit traffic" harming Russian subjects "on the Aleutian Islands and on the north-west coast of America" as Alaska was then called. *See* Ukase of Sept. 4, 1821, *reprinted in* 2 *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 58-162 (1903-1904) (English translation) [hereinafter *ABT Proceedings*] (Exhibit US-I-28). The Czar concluded that "the principal cause of these difficulties is the want of rules establishing boundaries for navigation." *Id.* To address this problem, the Czar issued a ukase (an imperial edict) stating: "It is therefore prohibited to all foreign vessels not only to land on the coast and islands belonging to Russia as stated above, but also, to approach them within less than 100 Italian miles [80.4 nautical miles]. The transgressor's vessel is subject to confiscation along with the whole cargo." *Id.*

This ukase did not remain in effect long. Russia's claim of a right to exclude all vessels from traveling within 100 Italian miles of the coast violated the then-common Cannon Shot Rule.

Under that rule, a coastal nation generally had sovereignty only over the waters within the range of cannon shot (about three nautical miles) from its shore. *See Cook Inlet*, 422 U.S. at 191 n.11. As the Court previously has observed, "shortly after it had been issued the ukase was unequivocally withdrawn in the face of vigorous protests from the United States and England." *Id.* at 191-192.

The withdrawal of the ukase led to negotiations between Russia and the United States and Russia and Britain. In 1822, during these negotiations, Russia ordered naval vessels carrying out the ukase's regulations to limit "their application to waters generally recognized by other powers as territorial." 2 *ABT Proceedings*, *supra*, at 14 (footnote omitted). In other words, Russia directed "'its officers to restrict their surveillance of foreign vessels to the distance of cannon shot from the shores.'" 1 John B. Moore, *A Digest of International Law* 926 (1906) (quoting a summary by Justice John Marshall Harlan, who served as an arbitrator at the 1902 United States-Russian Fur Seal Arbitration) (Exhibit US-I-15).

b. Treaties with the United States and Britain

In 1824, the negotiations following the withdrawal of the ukase produced a treaty between the United States and Russia. *See* Convention Between the United States of America and Russia, 8 Stat. 302 (1825) [hereinafter 1824 Treaty]. Article 3 of this treaty restricted new Russian and American settlements. It said:

> It is moreover agreed, that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the

> Northwest Coast of America, nor in any of the islands adjacent, *to the north* of fifty four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, *south* of the same parallel.

Id. at 304 (emphasis in original). Article 4 then gave United States and Russian vessels certain rights for a period of ten years. It said:

> It is, nevertheless, understood, that, during a term of ten years, counting from the signature of the present convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulphs, harbours, and creeks [i.e., small bays],[18] upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.

Id.

Alaska and the United States ascribe different meanings to article 4 of the 1824 Treaty. Alaska asserts that, through article 4, Russia was implicitly claiming, and the United States was tacitly conceding, that Russia would have the right to exclude United States nationals from all of the waters of the Alexander Archipelago upon the expiration of the ten-year period. *See* Alaska Count I Opposition at 8. The United States contends that article 4 has no such implication, but merely constitutes an

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[18]The parties agree that the term "creeks" meant small bays. *See* U.S. Count I Opposition at 8 n.2; Alaska Count I Reply at 9.

agreement that Americans could enter Russian marine territorial waters for ten years for the purposes of trade and fishing. *See* U.S. Count I Opposition at 8-9. In other words, according to the United States, the treaty embodied a limited 10-year waiver of Russia's right to regulate commercial activity within its territorial waters.

The Special Master agrees with the United States' interpretation of the 1824 Treaty for four reasons. First, article 4 authorizes navigation "for the purpose of fishing and trading with the natives." It does not address navigation for the purpose of innocent passage. The article therefore does not imply that Russia would have the right to exclude American vessels from making innocent passage after expiration of the ten-year period.

Second, Alaska's interpretation of article 4 rests upon the unjustified assumption that all of the waters of the Alexander Archipelago are "interior seas, gulphs, harbours, and creeks, upon the coast." *See* Alaska Count I Memorandum at 7-8; Alaska Count I Reply at 9-10. The term "coast" in Article 4 refers not just to the coast of the Alexander Archipelago but instead to "the coast mentioned in the preceding article." The preceding article, article 3, addresses the entire "Northwest Coast of America . . . *to the north* of fifty four degrees and forty minutes of north latitude." 8 Stat. at 304. It is implausible that the United States, having just objected to the ukase because it exceeded the accepted limit to territorial waters, would sign a treaty implicitly acknowledging that Russia had power to exclude foreign vessels beyond three nautical miles from the entire northwest coast. On the contrary, as the United States argues, *see* U.S. Count I Opposition at 9, a more reasonable interpretation is that article 4 recognized Russian sovereignty

over bodies of water having the shape of "gulfs" or "internal seas" only if they satisfied international rules for the delimitation of maritime boundaries. Some of the waters of the Alexander Archipelago lie more than three nautical miles (or a cannon shot) away from the shore. Therefore, contrary to Alaska's argument, article 4 does not imply that all the waters off the coast of the Alexander Archipelago are "interior seas, gulphs, harbours, and creeks."

Third, Alaska's view would contradict precedent. If Russia were implicitly claiming in article 4 the right to exclude access to all interior seas, gulfs, harbors, and creeks along the entire Alaskan coast, then Russia necessarily would have been claiming the right to exclude access to Cook Inlet. The Court, however, previously held that Russia did not exercise the right to exclude access to Cook Inlet. *See Alaska (Cook Inlet)*, 422 U.S. at 191-192.

Fourth, Alaska's position that Russia implicitly claimed a right to exclude all vessels from the Alexander Archipelago is inconsistent with a treaty that Russia made with Great Britain in 1825. *See* Treaty Between Great Britain and Russia, Signed at St. Petersburg, February 16/28, 1825 [hereinafter 1825 Treaty] (Exhibit US-I-16). Article 3 of the 1825 Treaty established a line of demarcation between Russia's Alaska territory and what is now British Columbia, which was then a British dominion.[19] *See id.* art. 3. Article 6 then said:

[19]In the late 1700s, Britain secured the area that is now British Columbia in Canada. Britain continued to participate in Canadian governance until the late 20th century.

> It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean, or from the interior of the continent, shall for ever enjoy the right of navigating freely, and without hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in article three of the present convention.

Id. art. 6. Article 7 of the 1825 Treaty, like article 4 of the 1824 Treaty with the United States, granted Britain a ten-year right "to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in article three for the purpose of fishing and trading with the natives." *Id.* art. 7.

Article 6 undisputedly applied to the Stikine River, which begins in British Columbia, crosses the Alaskan mainland, and then empties into the waters of the Alexander Archipelago. Under article 6, British vessels could use the Stikine River to pass through the Alaskan mainland when traveling from the Pacific Ocean to British Columbia, or vice versa. As the United States argues, *see* U.S. Count I Opposition at 9, a right to use the Stikine River "forever" would have no value unless British vessels also had a perpetual right to make innocent passage through the Alexander Archipelago to reach the Stikine River. Article 7 of the 1825 Treaty and the similarly worded article 4 of the 1824 Treaty therefore do not imply that Russia was claiming a right to exclude foreign vessels from making innocent passage through the waters of the Alexander Archipelago.

For these reasons, the Special Master concludes that Russia did not implicitly claim a right to exclude vessels from all the waters of the Alexander Archipelago in the 1824 Treaty with the United States or the 1825 Treaty with Britain.

c. The *Dryad* Incident

In 1834, an incident occurred involving the *Dryad*, a British vessel belonging to the Hudson Bay Company. A description of the incident appears in a report written by the United States' expert, Dr. Barry M. Gough, a professor of history at the Wilfred Laurier University in Waterloo, Ontario. *See* Barry M. Gough, *Report on International Navigation through the Waters of the Alexander Archipelago of Southeast Alaska* 17-23 (Jan. 7, 2002) (Exhibit US-I-2). Alaska cites Gough's report, and does not dispute its factual accuracy. *See* Alaska Count I Reply at 16.

According to Gough, the *Dryad* sailed from the Columbia River to the waters of the Alexander Archipelago. The vessel then navigated through the waters of the Alexander Archipelago, toward the Stikine River. The crew planned to take boats up the Stikine river into British Columbia. A Russian Brig commanded by an officer named Sarembo (also spelled Zarembo) stopped the *Dryad* near Fort Dionysius, an outpost near the mouth of the Stikine River in the area where the city of Wrangell now is located. Sarembo "warned that if the British attempted to proceed up the river in boats that he would make use of the force he had against them." Gough, *supra*, at 18. An officer of the *Dryad*, Peter Ogden, protested that the crew of the *Dryad* had the right to proceed up the river under article 6 of the 1825 Treaty. Sarembo, however, refused to relent, saying that

he had instructions from Baron Wrangell, the Governor of Russian Alaska, not to permit them to enter. The *Dryad* and its crew returned to the Columbia River. *See id.* at 19.

The British protested the incident to the Russian government with some success. Gough reports:

> In consequence of British diplomatic representations to St. Petersburg the Russian government disavowed Governor Wrangell's reading of the 1825 Convention. In [the] future [the Hudson Bay Company], and indeed all British traders on legitimate business, would not be interfered with. The Russians did not admit that the *Dryad* had been stopped by force or by threat of same. Language difficulties had led to the problem between Sarembo and Ogden.

Id. at 21.

The parties disagree about the meaning of these facts. Alaska says that the *Dryad* incident "cast doubt on Britain's right to navigate the waters of the Archipelago." Alaska Count I Reply at 16. The United States, in contrast, says that the Russians were not blocking entry into the Archipelago's waters, but entry into the Stikine River (in violation of the 1825 Treaty). *See* U.S. Count I Reply at 16 n.9.

The Special Master agrees with the United States' interpretation. Sarembo stopped the *Dryad* near the mouth of the Stikine River and would not allow the vessel to proceed further because he wanted to prevent its crew from taking boats up the Stikine River. The incident also does not define Russian policy with respect to navigation of either the Stikine River or the waters of the Archipelago because the Russian government in St. Peters-

burg did not admit that the incident had happened, and assured Britain that no interference would occur in the future.

d. Expiration of the Treaties

The rights of American vessels to fish and trade with natives under article 4 of the 1824 treaty expired in April 1834. The similar rights of British vessels under article 7 of the 1825 treaty ended in February 1835. A report subsequently prepared for the 1903 Alaska Boundary Tribunal summarizes what happened next. The report says that, as these treaties expired, Governor Wrangell gave oral and written notice to sea captains in Sitka that they could not proceed with "their trading voyages through the inland waters of the colony." 1 *ABT Proceedings*, *supra*, pt. 2, at 69 (Exhibit AK-13). Russia's minister in Washington then informed the State Department of the expiration of the treaty, and asked the State Department "to give public notice of the changed conditions." *Id.* at 70. Notice subsequently was published in the Globe newspaper. *See id.*

In addition to these actions, in March 1835, the report says that Governor Wrangell "took more active steps to exclude foreign traders from the 'Straits.'" *Id.* at 69. The report explains:

> Governor Wrangell sent the brig *Chichagoff*, under command of Lieutenant Zarembo, to Tongas, near the southern boundary line at 54° 40', for the purpose of intercepting foreign vessels entering the inland waters of the colony, to the masters of which he was to deliver written notice of the expiration of the treaty provisions, being furnished with six copies for American and three for British vessels.

Id. at 70 (footnote omitted).

The parties interpret this description of the facts in different ways. Alaska says that the "references to straits, inland waters, 54° 40', and exclusion from Russian possessions confirmed that Russia claimed the right to exclude foreign vessels from *all* the waters of the Archipelago." Alaska Count I Reply at 12-13 (emphasis in original). The United States argues that the quotations show that the *Chichagoff*'s purpose was to provide traders with notice of the expiration of the treaties, not necessarily to repel them or anyone else making innocent passage. *See* U.S. Count I Reply at 7.

The Special Master agrees with the United States' interpretation. The report does not indicate what constituted the "straits" to which it refers, and no clear basis exists for equating the "straits" with all the waters of the Alexander Archipelago. In addition, nothing in the report says that Governor Wrangell or the *Chichagoff* sought to prevent foreign vessels from making innocent passage through the waters of the Alexander Archipelago; on the contrary, the report focuses entirely on traders whose rights under article 4 of the 1824 and article 7 of the 1825 had expired. In addition, although the report says that Governor Wrangell took more active steps to "exclude" traders, it provides no examples.

e. The *Loriot* Incident

In 1836, an incident occurred involving an American vessel called the *Loriot*. John Forsyth, a State Department official in Washington, wrote a letter to G.M. Dallas, a member of the United States legation in St. Petersburg, describing the incident.

His letter bears quoting at length because the parties have read it in very different ways. The letter says:

> The American brig *Loriot*, [Richard] Blinn, master, sailed from the Port of Oahu on the 22d of August last [i.e., 1836], bound to the northwest coast of America, for the purpose of procuring provisions, and also Indians to hunt for sea otter on the said coast. It appears that she made the land called Forrester's Island on the 14th of September following, and on the 15th anchored in the harbor of Tuckessan, latitude 54° 55' north, and longitude 132° 30' west; that on the 18th a Russian armed brig arrived in the harbor of Tateskey, latitude 54° 45' north, and longitude 132° 55' west; that on the succeeding day the *Loriot* was boarded by officers from the Russian brig, who ordered the captain of the American vessel to leave the dominions of His Majesty the Emperor of Russia; that Captain Blinn then repaired on board the Russian brig, where the same orders were repeated to him by the commander; that on the 20th and 23d days of the same month these orders were reiterated; that on the 25th the *Loriot* was boarded by two armed boats from the Russian brig, and directed to get under weigh and proceed to the harbor of Tateskey; that on the 27th the armed boats again boarded the American brig, and compelled the captain to proceed to Tatesky; that when off that place, the weather being threatening, permission was asked of the Russian commander to enter the harbor with the *Loriot*, which request was denied, and Captain Blinn was again ordered to leave the waters of His Imperial Majesty; and that Captain Blinn, being prevented from procuring supplies or

> necessaries for his vessel and from obtaining any Indians (for the purpose of hunting sea otter), was finally obliged to abandon his voyage and return to the Sandwich Islands, where he arrived on the 1st of November of the same year.

Letter from John Forsyth to G.M. Dallas (May 4, 1837), *reprinted in Report of Secretary of State Thomas F. Bayard upon the Seal Fisheries in Bering Sea*, Sen. Ex. Doc. No. 50-106, at 232-233 (1889) [hereinafter *Seal Fisheries Report*] (Exhibit AK-11, at HW 12339-40).[20]

Dallas responded by writing a letter to Charles Robert, Count of Nesselrode. Nesselrode was Russia's Secretary of State directing the administration of Foreign Affairs, and had signed the 1824 treaty with the United States. *See* 8 Stat. at 302. In the letter, Dallas recognized that article 4 of the 1824 Treaty had expired but criticized the harshness and unfriendliness of Russia's treatment of the *Loriot*. *See* Letter from G.M. Dallas to Count Nesselrode (August 15/27, 1837), *reprinted in Seal Fisheries Report*, *supra*, at 235-236 (Exhibit AK-11, at HW 12342-43). Nesselrode investigated the incident, and responded: "It appears . . . that in notifying Mr. Richard Blinn to quit the shores where he was, the commander of the Russian brig did nothing more than conform with the instructions given to him at the expiration of the fourth article of the [1824] convention." Letter from Count Nesselrode to G.M. Dallas

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[20]The reproduction process has obscured some of the original page numbering of the copy of the *Seal Fisheries Report* submitted as an exhibit. In citing the report, the Special Master accordingly refers also to supplemental page numbering provided by Alaska.

(Feb. 23, 1838), *reprinted in Seal Fisheries Report, supra*, at 238 (Exhibit AK-11, at HW 12345). Further diplomatic correspondence followed. Russia adhered to its position, and refused to renew article 4 of the treaty. *See* Letter from Count Nesselrode to G.M. Dallas (Mar. 9, 1838), *reprinted in Seal Fisheries Report, supra*, at 245-46 (Exhibit AK-11, at HW 12352). The United States took no further action.

The parties dispute the meaning of these documents. Alaska interprets them to demonstrate that Russia both "claimed the right to exclude foreign vessels from *all* the waters of the Archipelago" and "*exercised* that right by expelling the United States vessel *Loriot* from the Archipelago." Alaska Count I Reply at 13 (emphasis in original). *See also* Alaska Count I Memorandum at 8; Alaska Count I Opposition at 9. The United States disagrees, saying that Russia objected only to the *Loriot*'s entering of two harbors—Tuckessan and Tateskey—and did not exclude the vessel from all the waters of the Archipelago. *See* U.S. Count I Opposition at 10.

The quoted excerpt of the letter from Forsyth to Dallas unambiguously establishes several facts: (1) the *Loriot* was asked to leave the harbor of Tuckessan in which it was anchored; (2) the *Loriot* was denied permission to enter the harbor of Tatesky; (3) the *Loriot* was not engaged in mere innocent passage through the waters of the Alexander Archipelago, but instead planned to hunt sea otters and trade with Indians; and (4) the *Loriot* left the waters of the Alexander Archipelago and returned to Hawaii because it did not have the supplies necessary for hunting.

Less clear from the letter is what the Russian officials meant when they twice ordered the *Loriot* to leave the waters of His

Imperial Majesty. These waters at a minimum included the harbors of Tuckessan and Tatesky. They also may have included some territory outside the harbors because the *Loriot* was denied permission to enter the Tatesky harbor and then, when it was outside the harbor ("off that place"), further ordered to leave the waters of His Imperial Majesty. But nothing in the letter confirms that "the waters of His Imperial Majesty" outside the harbor included all of the Alexander Archipelago; they may have included only waters within the distance of a cannon shot. Indeed, Nesselrode's February 1838 letter shows that Nesselrode believed that the Russian officials only had ordered the *Loriot* to leave the "shores." *Seal Fisheries Report, supra*, at 238 (Exhibit AK-11, at HW 12345).

f. State Department Notice to Mariners

On September 26, 1845, the Department of State published the following notice in the Daily Union newspaper in Washington, D.C.:

> The Russian Minister at Washington has informed the Secretary of State that the Imperial Government, desirous of affording official protection to the Russian territories in North America against the infractions of foreign vessels, has authorized cruisers to be established for this purpose along the coast by the Russian-American Company. It is, therefore, recommended to American vessels to be careful not to violate the existing treaty between the two countries, by resorting to any point upon the Russian American coast where there is a Russian establishment, without the permission of the governor or commander, nor to frequent the interior seas, gulfs, harbors, and creeks

upon that coast at any point north of the latitude of 54° 40'.

2 *ABT Proceedings*, *supra*, at 250.

Alaska and the United States interpret this notice in different ways. Alaska describes the notice as an acquiescence that "marked full recognition by the United States of Russia's 'complete sovereignty' over the waters of the Archipelago." Alaska Count I Memorandum at 8. The United States, in contrast, says that the notice shows that the United States recognized Russian sovereignty over the mainland coast, not over the waters of the Archipelago. *See* U.S. Count I Opposition at 10-11.

The Special Master agrees with the United States' interpretation. The notice first tells Americans not to visit areas of Russian settlement on the land. This part of the warning does not address the legal status of any Alaskan waters. The notice then mentions the 1824 Treaty's provision regarding "interior seas, gulfs, harbors, and creeks." The Special Master previously has concluded that these phrases do not describe the entirety of the waters of the Alexander Archipelago, but instead those bodies of water along the entire Alaskan coast having the shape of gulfs, harbors, and so forth, and satisfying international rules for the delimitation of inland waters. *See supra* part II.C.1.b.

2. Period of 1867-1903

The United States, as noted above, gained sovereignty over Alaska in 1867. The parties have cited, in support of their respective positions, various documents produced during the next 36 years.

a. The 1871 Treaty with Britain

In 1871, the United States entered into a wide-ranging treaty with Great Britain. *See* Treaty Between the United States and Great Britain of May 8, 1871, 17 Stat. 863 (1873) [hereinafter 1871 Treaty]. Article 26 of the treaty addressed navigation of three rivers that start in Canada and then flow through Alaska to the sea. The United States granted Britain the right to use these rivers to cross Alaskan territory when traveling to and from Canada. Article 26 of the 1871 Treaty said:

> The navigation of the rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the subjects of her Britannic Majesty and to the citizens of the United States, subject to any laws and regulations of either country within its own territory, not inconsistent with such privilege of free navigation.

Id. at 872.

The United States contends that this provision contains an important implication. Although vessels can enter the mouth of the Stikine River only by traversing the Alexander Archipelago, the treaty contained no provision granting Britain the right to make passage through the Archipelago's waters. The United States argues that the absence of any provision permitting Britain to navigate the waters of the Alexander Archipelago implies that the United States was not claiming a right to exclude Britain, and that Britain did not believe that the United States had such a right. *See* U.S. Count I Opposition at 9-10.

The Special Master agrees with this interpretation of the 1871 Treaty.[21] As with the 1825 Treaty between Britain and Russia, granting British vessels the right to navigate the Stikine River to and from the sea would serve no purpose unless these vessels also had the right to cross the waters of the Alexander Archipelago. The United States and Britain must have assumed when they made the 1871 Treaty that British vessels were free to make innocent passage through those waters or they would have stated that right in the treaty.

b. Fur Seal Arbitration

In 1886, the United States seized several Canadian vessels in the Bering Sea, which lies between Alaska and Russia and connects the Pacific Ocean to the Arctic Ocean. The vessels had been hunting fur seals on the high seas, more than three miles from the shore, allegedly in violation of United States law. Britain objected that the United States had no right to regulate seal hunting on the high seas. In 1893, an international arbitral tribunal in Paris resolved the controversy in favor of Britain, and ordered the United States to pay damages.

During the course of the fur seal arbitration a British representative, Sir Charles Russell, addressed the effect of

[21] As described more fully below, *see infra* part II.C.2.c.(5), Professor William Healy Dall, an expert on Alaskan geography, expressed the opposite view in an 1881 letter to Secretary of State Thomas F. Bayard. In the letter, Dall specifically asserted that the United States could exclude British vessels and thus render the British rights to navigate the Stikine River nugatory. The Special Master disagrees with Dall's interpretation.

article 4 of the 1824 Treaty between the United States and Russia. He said:

> [T]he importance of Article IV is that it gives a temporary advantage to the United States—that is to say, it gives to United States subjects rights of access to interior seas, to gulfs, to harbours, and to creeks, all of which, or the greater part of which, would be strictly territorial waters; and, therefore, to which, upon the general rule of international law, the United States would not have any right of access at all.

8 *Proceedings of the Tribunal of Arbitration Convened at Paris*, Sen. Exec. Doc. No. 53-177, pt. 13, at 142 (1895) (Exhibit AK-79).

The parties interpret this statement in different ways. According to Alaska, the statement shows that Britain recognized that "the waters of the Archipelago are inland, for the United States would have had a right to navigate them if they were either territorial seas or high seas as the United States now claims." Alaska Count I Memorandum at 28. The United States, in contrast, reads the quotation to say that the 1824 Treaty temporarily suspended Russia's power to exclude foreign vessels from Russia's inland waters but the quotation does not say that all the waters of the Alexander Archipelago are inland waters. *See* U.S. Count I Opposition at 27-28.

The Special Master agrees with the United States' interpretation. The Special Master previously has concluded that article 4 of the 1824 Treaty does not describe all the waters of the Alexander Archipelago, but instead only those bodies of water having the shape of gulfs, harbors, and so forth, and satisfying international rules for the delimitation of inland waters.

See supra part II.C.1.b. The quotation above does not suggest that Sir Charles Russell had a different interpretation.

c. Statements by Government Officials

Alaska and the United States have identified numerous statements about Alaskan waters that various government officials made during the 19th century. The parties disagree about the meaning of most of these statements.

(1) *Report on the Treaty of Cession with Russia*. In 1868, a report from the House Committee on Foreign Affairs identified advantages stemming from the acquisition of Alaska. One sentence of this 65-five page report said:

> The command of all bays and straits of the northwest coast, resorted to by the whale, will give very great advantages to our whalers, that need only be mentioned to be appreciated: fishing at all seasons, opportunities to winter and refit, depots for cargoes, and regularity in trans-shipping them to the east or to the Pacific ports.

Treaty with Russia, H.R. Rep. No. 40-37, at 33 (1868) (Exhibit AK-14).

The parties interpret this sentence in different ways. Alaska says that this sentence shows that the "the right to bar foreign vessels" from all the waters of the Archipelago "was seen as one of the benefits of the purchase" of the Alaska Territory. Alaska Count I Memorandum at 9. The United States disagrees, saying that the sentence does not specifically address the Alexander Archipelago, and that it concerns advantages to whalers "in terms of activities possible by virtue of landing rights" rather than exclusion of foreign vessels. *See* U.S. Count I Opposition at 12.

The Special Master agrees with the United States' interpretation. The phrase "command of all bays and straits" refers to command of whaling rights. Nothing in the quotation claims a right to exclude foreign vessels from making innocent passage.

(2) *Naval Reports*. In October 1880, the Commander of the *U.S.S. Jamestown* stationed in Sitka issued a monthly report to the Secretary of the Navy. One sentence of the report related the following information: "In September, taking advantage of the monthly visit of the steamer Favorite to trading posts on inland waters, I sent Lieut. F.M. Symonds to make as thorough examinations of the harbors and passes visited as the time at his disposal would permit, and to collect hydrographic knowledge of value." *Report of United States Naval Officers Cruising in Alaska Waters*, H.R. Exec. Doc. No. 47-81, at 2 (1882) [hereinafter *Naval Reports*] (Exhibit AK-15). Alaska cites this sentence as evidence that "United States officials consistently recognized the Federal Government's dominion over the waters of the Archipelago." Alaska Count I Memorandum at 9. Alaska notes that the commander in this sentence "referred to the 'inland waters' of the Archipelago, without in any way indicating that some of the waters of the Archipelago included the high seas." *Id.* at 10. The United States disagrees, saying that the letter appears to use the words "inland waters" in a non-legal sense to refer to unspecified sheltered waters. *See* U.S. Count I Opposition at 12. The Special Master concludes that the terms of the letter better support the United States' interpretation.

In 1880 and 1881, Navy Lieutenant Commander Rockwell wrote reports from Alaska. One report mentioned "inland waters" of the Alexander Archipelago. *Naval Reports*, *supra*,

at 41. Similarly, in 1880, Navy Commander L.A. Beardslee wrote various reports concerning the Alexander Archipelago. In the reports, he used the phrases "inland waters," "our waters," "Alaska waters," "United States waters," and "inland seas." *Report of Captain L.A. Beardslee*, S. Exec. Doc. No. 47-71, at 32, 61, 69, 74, 76, 83-84 (1882) (Exhibit AK-301). Alaska says that these words show that "government officials recognized the inland-water status of the Archipelago." Alaska Count I Opposition at 12.

The Special Master disagrees. As used by Rockwell and Beardslee, the references to "inland waters" and "inlands seas" appear to refer to the sheltered characteristics of the waters described rather than their legal status. The phrases "our waters," "Alaska waters," and "United States waters," in contrast, unmistakably indicate that Beardslee believed that the United States had some sovereignty over some waters, but the statements lack specificity. The Special Master sees no basis for inferring that the quotations mean that the United States was asserting a right to exclude foreign vessels from all of the waters of the Alexander Archipelago.

(3) *Military Reconnaissance Report.* In 1883, Army Lieutenant Frederick Schwatka led a party to visit native Alaskan tribes. In his report, he described the Alexander Archipelago. Part of his description said: "The inland passages of Alaska extend from Dixon Entrance to Cross Sound, a distance of about 330 miles . . . ." Frederick Schwatka, *Military Reconnaissance in Alaska* (1883), *reprinted in Letter from the Secretary of War*, S. Exec. Doc. No. 48-2, at 4 (1884) (Exhibit AK-302). Alaska contends that this statement also recognizes the "inland-water status of the Archipelago." Alaska Count I

Opposition at 12. The Special Master finds this conclusion unsupported. Schwatka's report appears to describe the physical condition of the waters rather than their legal classification.

(4) *Letter from Secretary of State Thomas F. Bayard.* In 1886, Secretary of State Thomas F. Bayard wrote a letter to Secretary of the Treasury Daniel Manning. *See* Letter from Thomas F. Bayard, Secretary, U.S. Dep't of State, to Daniel Manning, Secretary, U.S. Dep't of Treasury (May 28, 1886), *reprinted in* Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, Appendix, at 13a-18a, *United States v. California* (U.S. Jun. 1964) (No. 5, Orig.) [hereinafter California Answer] (Exhibit US-I-6). The parties each consider the letter very important because it describes the official position of the State Department. The United States and Alaska, however, disagree about what the letter means.

The letter contains eleven paragraphs. In the initial paragraph, Bayard says that it would be desirable for the Departments of the Government to agree on the limits of the territorial waters of the United States on both the northeastern and northwestern coasts. *See id.* at 13a. The paragraph then indicates that the letter will provide the State Department's legal position on the question whether the United States may claim more than a three-mile belt of territorial sea on the northwest coast. *See id.* at 13a-14a. The initial paragraph says:

> What I have here to communicate bears, so far as concerns the Department over which you preside, on our own claim to a jurisdiction over territorial waters on the northwest coast beyond the three-mile zone. We resist

> this claim when advanced against us on the northeastern coast. What is now submitted to you is the question whether the principle asserted by us does not preclude us from setting up an extension, beyond this limit of our marine jurisdiction in the northwest.

Id.

Paragraphs 2 through 9 then recount historical instances in which the United States expressed its position on the territorial sea in the East. *See id.* at 14a-16a. This history, according to Bayard, showed that the United States consistently had claimed a territorial sea of only three nautical miles. Paragraph 10 concludes this summary by saying:

> We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

Id. at 16a.

Paragraph 11, the lengthy final paragraph of the letter, then makes several points. The paragraph first says that the United States has not taken this position "speculatively" but has

advanced it "when the question of peace or war hung on the decision." *Id.* The paragraph then explains that, in asserting the three-mile belt of territorial sea, the United States does not "deny the free right of vessels of other nations to pass, on peaceful errands, through this zone." *Id.* at 17a. The paragraph adds that fishing boats and other vessels have "the right not merely of free transit" but also the right "of relief, when suffering from want of necessaries, from the shore." *Id.* at 18a. The paragraph concludes by saying:

> These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the British sceptre. We can not refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them, as is seen by Mr. Fish's instruction, above quoted of December 1, 1875, against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase.

Id. at 18a.

The United States reads Bayard's letter as "explicitly stating that the U.S. claims only a three-mile territorial sea along the coast of Alaska." U.S. Count I Reply at 12. The letter, according to the United States, thus shows that the United States did not view the Alexander Archipelago as inland waters. *See* U.S. Count I Memorandum at 34.

Alaska disagrees. It asserts that in the first paragraph of the letter "Bayard acknowledged—as Alaska contends—'*our own claim* to a jurisdiction over territorial waters on the northwest

coast *beyond the three-mile zone.*'" Alaska Count I Opposition at 23 (quoting California Answer, *supra*, at 13a-14a (emphasis added by Alaska)). Alaska further believes that the letter does not reveal the general policy of the United States but addresses only fishing rights off the eastern coast of North America under an 1818 treaty with Britain. *See id.* at 24-25. Alaska says that Special Master William H. Davis interpreted Bayard's letter in the same manner in *United States v. California*. *See id.* at 24 (citing Report of Special Master at 15-16, *United States v. California* (U.S. Oct. 14, 1952) (No. 6, Orig.) [hereinafter California Report]).

The Special Master agrees with the United States's interpretation. The opening paragraph of Bayard's letter indicates that the letter will provide a legal statement on the question whether the United States could claim more than three nautical miles of territorial sea. The quoted portions of the letter show that Bayard believed that the United States had not made a claim to more than three nautical miles on the northeastern coast and should not make such a claim on the northwestern coast. Nothing in the letter reveals that the United States ever had made a claim to a jurisdiction extending more than three nautical miles in Alaskan waters.

Secretary Bayard's letter also does not have the limited focus of addressing fishing rights under the 1818 treaty with Britain. Instead, the letter by its own terms makes clear that Bayard is providing a statement of law "as to the limit of territorial waters on our northeastern and northwestern coasts." California Answer, *supra*, at 13a. The letter, moreover, addresses not only fishing rights, but also the rights of foreign vessels to make "free transit" through the territorial sea. *See id.* at 18a. The

letter further specifically applies this legal standard to Alaska. Special Master Davis's report does not say that Bayard's letter had only the limited focus that Alaska alleges. *See* California Report, *supra*, at 14-15.

(5) *Letter to Secretary of State Bayard.* In 1888, Professor William Healy Dall, an expert on Alaskan geography and a scientist who worked with the United States Geological Survey, met with Dr. George M. Dawson of Canada to discuss the boundary between Alaska and British Columbia. The two men were acting unofficially, but hoped to come up with a practical plan for settling on a boundary line. They agreed on several points, which Dall later reported in a letter to Secretary of State Thomas F. Bayard. One point concerned freedom of navigation. They agreed:

> [This freedom] should include the right or concession of the right of navigating the salt-water channels and so-called inland passages of the coast archipelagos and inlets in British Columbia and in Alaska, respectively, by citizens of the United States and subjects of Great Britain.
>
> There is no doubt that the navigation of these coast and territorial waters might be wholly or partly withheld by either power from the citizens and vessels of the other; thus materially curtailing or rendering nugatory the conceded right to navigate the navigable rivers which extend beyond the boundary into British territory, for Great Britain, and obliging vessels of the United States, bound for ports in Alaska, to take the exposed "outside passage" between the Straits of Fuca and the territorial waters of Alaska.

Letter from William H. Dall to Thomas F. Bayard, Secretary, U.S. Dep't of State (Feb. 13, 1888), *reprinted in Report on the Boundary Line Between Alaska and British Columbia*, S. Exec. Doc. No. 50-146, at 10 (1889) [hereinafter *Alaska Boundary Report*] (Exhibit AK-16 at HW12860). Although the discussion had occurred informally, the Secretary of State decided to publish Dall's letter and related correspondence, which he considered "of value as bearing upon a subject of great international importance." Letter from Thomas F. Bayard, Secretary, U.S. Dep't of State to President Grover Cleveland, *reprinted in Alaska Boundary Report*, *supra*, at 1 (Exhibit AK-16 at HW12851).

Alaska interprets Dall's letter to mean that Dall and Dawson viewed some or all of the waterways of the Alexander Archipelago as inland waters from which the United States had the right to exclude foreign vessels. *See* Alaska Count I Memorandum at 10. The United States does not disagree with this interpretation of Dall's letter, but merely disputes its importance. *See* U.S. Count I Opposition at 12-13. The Special Master considers below whether this letter and other exhibits suffice to establish Alaska's historic inland waters claim. *See infra* part II.D.1.b.

(6) *Report of Governor Knapp*. In 1889, District of Alaska Governor Lyman E. Knapp wrote a report to the Secretary of Interior complaining about the inadequate means of transportation available for the administration of justice. Governor Knapp said in the report:

> There are a great number of native villages situated at a distance from the mail-steamer routes, with no access to them except by canoe. In many instances, it has been impossible to serve processes for want of a light-draught vessel within the absolute and immediate control of the civil government . . . . A vessel of 100 tons capacity, thoroughly built and sea-worthy, with a wooden hull, filled with first class machinery, *adapted to our inland channels*, with accommodation for twenty to twenty-five passengers, carrying one or two 3-inch-bore breech-loading guns and perhaps a Gatling gun, would probably serve all ordinary purposes of the civil government when there is no unusual excitement or trouble.

Letter from John W. Noble, Secretary, U.S. Dep't of Interior to Sen. Orville H. Platt (Jan. 30, 1890) (emphasis added) (quoting report of Gov. Knapp), *reprinted in* S. Rep. No.51- 287, at 2 (1890) (Exhibit AK-17) *and in* H.R. Rep. No. 51-1203, at 2-3 (1890) (Exhibit AK-18).

Alaska notes that the quoted passage addressed the need for a vessel suited to Alaska's "inland channels," and did not indicate that "the waters of the Archipelago in fact contained high seas." Alaska Count I Memorandum at 10-11. The United States responds that Governor Knapp's statement does not claim of the right to exclude innocent passage within the Archipelago, but instead identifies a need for a vessel capable of operating in shallow and isolated waters. *See* U.S. Count I Opposition at 14. The Special Master concludes that the wording and context of the statement supports the United States' interpretation.

(7) *Report of the Treasury Secretary*. In 1897, Secretary of the Treasury John G. Carlisle reported to the Senate Commerce Committee that the Coast Survey had completed the work necessary for charting Alaska's "inland waters" but needed to

purchase a stronger vessel to handle the rough "outside" work. Vessel for Coast-Survey Service, S. Rep. No. 54-1507, at 1 (1897) (Exhibit AK-303). Alaska says that this statement recognizes the "inland-water status of the Archipelago." Alaska Count I Opposition at 12. The Special Master finds this conclusion unsupported. Carlisle's statement reflects the reality that the waters within the Alexander Archipelago are calmer than the unsheltered waters outside the Alexander Archipelago. It does not appear to address the proper legal characterization of the waters.

(8) *National Geographic Article*. John W. Foster served as Secretary of State from 1892 to 1893 and as an agent of the United States at the 1903 Alaska Boundary Tribunal. In 1899, he wrote an article about Alaska for *National Geographic* magazine. *See* John W. Foster, *The Alaskan Boundary*, 10 Nat'l Geographic 425 (1899) (Exhibit AK-299). In this article, he discussed the 1825 Treaty between Britain and Russia. Foster explained that the Treaty granted Russia a strip of territory along the coast separating British territory from the sea. *See id.* at 435. Foster said:

> [W]ith the strip of territory so established, all the interior waters of the ocean above its southern limit became Russian, and would be inaccessible to British ships and traders except by express license.

Id.

Article 7 of the 1825 Treaty, as explained in part II.C.1.b. above, granted a Britain a ten-year license to "to frequent, without any hindrance whatsoever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in article three for

the purpose of fishing and trading with the natives." 1825 Treaty, *supra*, art. 7. With respect to this provision, Foster said:

> This ten years' privilege is inconsistent with any other interpretation of the treaty than the complete sovereignty of Russia over, not only a strip of territory on the mainland which follows around the sinuosities of the sea, but also of the waters of all bays or inlets extending from the ocean into the mainland.

Foster, *supra*, at 439.

Alaska and the United States interpret these statements in different ways. Alaska reads Foster's statements to say that Russia had "'complete sovereignty' over all the waters of the Archipelago." Alaska Count I Opposition at 11. The United States, in contrast, says that Foster was referring to "Russian sovereignty over rivers and bays extending into the *mainland*—not to the Archipelago straits." U.S. Count I Reply at 7 (emphasis in original).

The Special Master agrees with the United States' interpretation. In the first quotation above, Foster refers to the "interior waters of the ocean." He does not say that all of the waters of the Alexander Archipelago are interior waters. In the second quotation above, Foster adverts more specifically to "the waters of all bays or inlets extending from the ocean into the mainland." This reference appears to address rivers and bays rather than all of the waters of the Alexander Archipelago.

(9) *Congressional Reports Addressing Navigational Aids*. Between 1900 and 1903, five congressional reports addressed the need for constructing lighthouse and fog signal stations in

Alaska.[22] These reports typically used the term "Alaskan waters" to describe waters in the Alexander Archipelago. For example, a Senate Commerce Committee report proposed an appropriation "for the establishment of aids to navigation in Alaskan waters, which appear to be imperatively demanded by the interests of navigation." *Light-Houses and Fog-Signal Stations, Alaska*, S. Rep. No. 56-170, at 2 (1900) (Exhibit AK-19). The report listed the locations for these aids as Eldred Rock, Ralston Point, Point Retreat, Point Gardner, Cape Ommaney, Point Stanhope, Fairway Island, Guard Island, Mary Island, Cape Fox, and Cape Fanshaw. *See id.* All of these locations lie within the Alexander Archipelago.

Alaska notes that these five reports refer to the "Alaskan waters" of the Archipelago, and do not mention that these

[22] *See Light-Houses and Fog-Signal Stations, Alaska*, S. Rep. No. 56-170, at 2 (1900) (Exhibit AK-19) (proposing appropriation for "aids to navigation in Alaskan waters"); *Joint Light-Houses and Fog-Signal Stations on the Coast of Alaska*, H.R. Rep. No. 56-1187, at 2 (1900) (Exhibit AK-20) (same); *Light-House and Fog-Signal Stations in Alaska Waters*, S. Rep. No. 56-1909, at 1 (1901) (Exhibit AK-21) (addressing bill providing for lights and fog signals in "Alaskan waters"); *Additional Light-House, Etc., Alaska*, S. Rep. No. 57-70, at 2 (1902) (Exhibit AK-22, at HW 12980) (discussing additional proposed light house sites in "Alaskan waters," some in the Alexander Archipelago and some in Western Alaska); *Construction of Light-House and Fog-Signal Stations in Alaskan Waters*, S. Rep. No. 57-2382, at 1 (1903) (Exhibit AK-23) (same); *Light-House and Fog-Signal Stations in Alaskan Waters*, H.R. Rep. No. 57-3811, at 1 (1903) (Exhibit AK-24) (same).

waters contain high seas. *See* Alaska Count I Memorandum at 11. The United States responds that these reports do not claim that waters of Alexander Archipelago have the legal status of inland waters. *See* U.S. Count I Opposition at 14. Instead, the United States says, the reports use the term "Alaskan waters" for waters of both western and southeastern Alaska in a sense that means "the waters off Alaska generally." *Id.* The Special Master agrees with the United States.

(10) *Letter from a Collector of Customs.* In 1902, David H. Jarvis, a collector of customs located in Sitka, Alaska, wrote a letter to Secretary of Treasury Leslie M. Shaw. In the letter, Jarvis expressed his views on whether the port of entry for customs collection should be located in Sitka or Juneau. For Sitka, he identified this advantage: "It has a good harbor—is situated directly on the seacoast, with interior communication with the inland waters." Letter from D.H. Jarvis, Collector of Customs, U.S. Customs Serv. to L.M. Shaw, Secretary, U.S. Dep't of Treas. (Dec. 8, 1902), *reprinted in Removal of Port of Entry from Sitka to Juneau, Alaska*, H.R. Rep. No. 57-3883, at 2 (1903) (Exhibit AK-25).

Alaska cites this letter as further evidence that government officials "as a matter of course" viewed the waters of the Alexander Archipelago as inland waters. Alaska Count I Memorandum at 11. The United States responds that the collector's statement does not describe maritime jurisdiction, explaining that the statement simply means Sitka has connections to other towns by water routes within the Archipelago. *See* U.S. Count I Opposition at 14. Based on the entire text of the letter, the Special Master agrees with the United States' interpretation.

3. The 1903 Boundary Arbitration Tribunal

In 1903, an international arbitration panel called the Alaska Boundary Tribunal decided a dispute between the United States and Britain regarding the land boundary between southeastern Alaska and Canada. A record of the arbitration appears in a seven-volume Senate document. *See ABT Proceedings*, *supra*. In previous litigation between Alaska and the United States over title to submerged lands off Alaska's arctic coast, Special Master J. Keith Mann prepared a concise and accessible summary of these arbitral proceedings. *See* Report of the Special Master at 61-65, *United States v. Alaska* (Mar. 1996) (No. 84, Orig.) [hereinafter Alaska Report].

Alaska has identified three highly relevant statements by the United States at the arbitration. First, in a written submission to the tribunal, the United States described in detail its view of the "political coast" of the Alexander Archipelago. The United States said:

> The political coast line (since all arms of the sea not exceeding six miles, and in some cases more, in width, and all islands are practically treated as portions of the mainland) extends outside the islands and waters between them. In the present instance the political or legal coast line drawn southward from Cape Spencer would cross to the northwestern shore of Chichagof Island and follow down the western side of that island and of Baranof Island to Cape Ommaney; at this point it would turn northward for a short distance and then cross Chatham Strait to the western shore of Kuiu Island; thence again turning southward along that shore and along the outlying islets west of Prince of Wales Island, the line would round Cape Muzon and proceed eastward to Cape Chacon; thence following northward along the eastern shore of Prince of Wales Island to Clarence Straight it would cross the latter at its entrance and proceed southeastward to the parallel of 54° 40' at the point where it enters Portland Canal. Thus the political coast line of Southeastern Alaska does not touch the mainland between Cape Spencer and 55° of north latitude.

4 *ABT Proceedings*, *supra*, pt. 1, at 31-32 (Exhibit AK-26). The political coast line described in this quotation encloses the waters of the Alexander Archipelago. *See* Appendix C (depicting these closing lines)

Second, the United States explained its authority for drawing the political coast line between the islands on the outside edge of the Archipelago. At the time of the arbitration, the United States sometimes followed "a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." *Alabama and Mississippi Boundary Case*, 470 U.S. at 106 (footnote omitted).[23] The islands named in the quotation above all lie within ten nautical miles of each other. Explaining this point, the United States said:

> The boundary of Alaska,—that is, the exterior boundary from which the marine league [of the territorial sea] is

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[23]The Court explained: "This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903." *Id.* at 106-107. This policy, however, was not followed firmly and continuously. *See Alaska (Arctic Coast)*, 521 U.S. at 20-21.

measured—runs along the outside edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands. When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which the exterior coast line is pierced, measure less then ten miles.

5 *ABT Proceedings*, *supra*, at 15-16 (Exhibit AK-8).

Third, the United States addressed the legal status of waters lying behind the closing lines described. During oral argument before the tribunal, Attorney Hannis Taylor, counsel for the United States, said:

> *[The political coast line] is an imaginary line which the law superimposes upon the physical coast line as a basis.* But for the purposes of international law, instead of following all the convolutions and sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these inlets are 10 miles. So we are not encumbered with that question. It is a legal fiction imposed by the operation of law as an accessory, as Rivier puts it, to the political coast line. *The minute you establish it, the minute you fix it, all waters back of it, whether they are waters in the Archipelago there of Alexander or the Archipiélago de Los Canarios, of Cuba, they all became, as Hall says, saltwater lakes: they are just as much interior waters as the interior waters of Loch Lomond*, and there is no earthly principle, so far as reason is concerned, by which any human being could claim that there could be a political-coast line back of a political coast line.

7 *ABT Proceedings*, *supra*, at 611 (Exhibit AK-27) (emphasis added) (argument of Hannis Taylor).

Alaska asserts that these statements show that the United States claimed the waters of the Alexander Archipelago as inland waters at the 1903 Alaska Boundary Tribunal. *See* Alaska Count I Memorandum at 11-15. The United States disagrees. It contends the quotations were not meant to assert a claim against the world that the waters of the Alexander Archipelago were inland waters. "Rather," it says, "the United States was simply responding, through the familiar technique of reductio ad absurdum, to the British arguments." U.S. Count I Motion at 27.

The United States' position requires some background to understand. The mainland coast in the area of the Alexander Archipelago contains a range of mountains called the Coast Mountains. The 1825 Treaty between Russia and Britain generally gave Russia a *lisière* or strip of land running along the coast, from the mainland shore to "the summit of the mountains . . . situated parallel to the coast."[24] Alaska Report, *supra*, at 62 n.22 (quoting 1 *ABT Proceedings*, *supra*, pt. 1, at 47). The treaty, however, said that whenever the summit was "more than

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[24]The 1825 Treaty was concluded in French. The quoted English translation comes from the Proceedings of the Alaska Boundary Tribunal. The original French version and a slightly different English translation appear in Exhibit US-I-16.

10 marine leagues [i.e., 30 nautical miles] from the ocean," the boundary would be "a line parallel to the windings of the coast, and which shall never exceed the distance of 10 marine leagues therefrom." *Id.* Put another way, Russian territory started at the shore and ended at the summit of the mountains or at a distance of ten leagues from the coast, whichever point was closer to the shore. Russia ceded all of this territory to the United States in the 1867 Treaty of Cession.

At the Alaska Boundary Tribunal arbitration, the parties generally agreed that measurement of the ten league distance should begin at the mainland's physical shore (as opposed to somewhere among islands located in the Archipelago). They disagreed, however, about where the ten league measurement should commence in areas where inlets of water cut far into mainland coast. A significant problem was Lynn Canal. Lynn Canal is the longest glacial fiord in the United States, opening near Juneau and stretching 100 miles into the mainland. Britain proposed drawing a closing line across Lynn Canal where it first narrows to ten miles in width (or alternatively to six miles) and then measuring ten leagues back from this closing line. *See id.* at 63-64. Part of Lynn Canal then would belong to Britain. Britain advocated these closing lines because they would increase British upland territory and would provide sites for ports on the mainland.

The United States successfully opposed the drawing of any closing line of the kind Britain desired across Lynn Canal. The United States argued that, under international law principles, closing lines are drawn across bodies of water only for designating political coast lines. In the course of making this argument, the United States described the political coast line of the

Alexander Archipelago in the statements quoted above. The United States contended that no legal basis supports drawing additional closing lines behind a political coast line. *See* 7 *ABT Proceedings*, *supra*, at 610-11.

The Special Master agrees with Alaska's interpretation of the three quotations. In the quoted statements, the United States clearly defined the political coast line of Southeast Alaska and explained the character of waters lying behind this political coast line. True, as both parties recognize, the political coast line was not at issue in the arbitration; the parties were arguing about how to measure ten leagues from the mainland shore for the purpose of applying the 1825 Treaty. The United States, however, chose to bolster its position by identifying what it considered the political coast line in the area. The detail of the quotations shows that the United States was expressing a considered analysis of the area, not merely speaking hypothetically for the purpose of showing a flaw in Britain's argument.

Others also have concluded that the United States was claiming the waters of the Alexander Archipelago as inland waters at the 1903 Alaska Boundary Tribunal. In the 1910 Atlantic Coast Fisheries Arbitration, Britain made the following statement: "In 1903, in the Alaskan Boundary Arbitration Case, the United States asserted that its boundary extended three miles beyond a line joining the islands which lie off the Alaska coasts." 8 *Proceedings in the North Atlantic Coast Fisheries Arbitration*, S. Doc. No. 61-870, at 86 (1912) [hereinafter *Atlantic Fisheries Arbitration*] (Exhibit AK-80). The United States disagreed with some aspects of Britain's interpretation of the United States' position at the 1903 Alaska Boundary Tribunal, but the United States did not dispute that it had

identified the political coast line as surrounding the islands in the Alexander Archipelago. *See* 10 *Atlantic Fisheries Arbitration, supra*, at 1091-94 (Exhibit AK-81).

In the *Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116, the International Court of Justice considered the maritime boundary of Norway.[25] In their submissions to the Court, the United Kingdom and Norway each cited the position of the United States at the Alaska Boundary Tribunal. They both said that the United States had claimed at the arbitration that the boundary of Alaska runs along the outer edge of the Alexander Archipelago. *See* English Translation of Annexes to the Counter Memorial of the Government of the Kingdom of Norway at 219, ¶ 446, *Anglo-Norwegian Fisheries Case* (1950) (Exhibit AK-82); 1 Reply of the Government of the United Kingdom of Great Britain and Northern Ireland at 154-55, ¶ 336, *Anglo-Norwegian Fisheries Case* (1950) (Exhibit AK-83).[26]

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[25] The Court has relied on the *Fisheries Case* with respect to coast line issues. *See,e.g., Maine (Nantucket Sound)*, 475 U.S. at 99; *Alabama and Mississippi Boundary Case*, 470 U.S. at 102.

[26] Special Master J. Keith Mann criticized Norway for its assertion that the United States continued to follow this straight base line until 1950. *See* Alaska Report, *supra*, at 95-96. Special Master Mann concluded, and the Court later agreed, that the United States did not consistently treat waters landward of fringing islands as inland waters whenever openings to the sea were less then ten miles wide. *See id.* at 98; *Alaska (Arctic Coast)*, 521 U.S. at 10-11.

In addition, an internal memorandum apparently written in 1952 by a United States Department of Justice attorney supports Alaska's interpretation. The author of the memorandum analyzed the Alaska Boundary Tribunal proceedings and expressed a similar view of the United States' position. Although the memorandum did not necessarily reflect the official views of the Department of Justice, it said that "the United States explicitly stated that the waters inside the islands [of the Archipelago] were inland waters *because* none of the ocean entrances exceeded ten miles in width." U.S. Dep't of Justice, *Alaskan Boundary Controversy* 1 (*circa* 1952) (Exhibit AK-29) (emphasis in original).

The Special Master assesses below whether the United States' position at the 1903 Alaska Boundary Tribunal, when combined with information from other exhibits, suffices to establish Alaska's right to summary judgment on its historic inland waters claim. *See infra* part II.D.1.b.

4. Period of 1903-1959

Many of the documents submitted by the parties concern the period between the Alaska Boundary Tribunal in 1903 and Alaska's statehood in 1959. These documents relate to fishing regulations, international law conferences, and arbitrations and negotiations between the United States, Britain, and Canada.

a. North Atlantic Fisheries Arbitration

The 1910 North Atlantic Fisheries Arbitration addressed a dispute over a clause of the Treaty of October 20, 1818 between the United States and Great Britain. *See* California Report, *supra*, at 15-17 (describing this arbitration). In the treaty, the

United States renounced the right "to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America." *Id.* at 16 (quoting treaty). At the arbitration, Britain argued that the treaty gave it the right to exclude American fishing from all bays regardless of their size. *See id.* at 16. The United States took the position that the treaty only covered bays having mouths six miles or less in width. *See id.*

The parties interpret this evidence in different ways. The United States says that its position at the 1910 North Atlantic Fisheries Arbitration shows that "even if Alaska were correct that the United States embraced 10-mile closing lines in the 1903 [Alaska Boundary Tribunal] arbitration, it promptly repudiated that position when the question of closing lines was squarely placed at issue." *See* U.S. Count I Memorandum at 35 (citation omitted). *See also* U.S. Count I Opposition at 28-29. Alaska says that the United States' position at the North Atlantic Fisheries Arbitration did not represent a general policy, but concerned only the quoted clause from the 1818 treaty. *See* Alaska Count I Opposition at 24-25. The State further asserts that Special Master William H. Davis reached the same conclusion when describing the 1910 North Atlantic Fisheries Arbitration in his report in *United States v. California*. *See id.* at 24 (citing *California Report*, *supra*, at 14-15).

The United States' has the better interpretation of the documents. Special Master Davis said that the 1910 North Atlantic Fisheries Arbitration "gave occasion for the United States repeatedly to assert its position as to the location of the baseline of the marginal belt." *California Report*, *supra*, at 15. Contrary to Alaska's interpretation, Special Master Davis does

not appear to have concluded that the United States limited its asserted position to the 1818 treaty.

b. Federal Fisheries Regulations

Alaska has endeavored to show that, prior to Alaska's statehood, the United States consistently asserted power to enforce fishing regulations against foreign nationals throughout the waters of the Alexander Archipelago, including the waters overlying the pockets and enclaves of the submerged lands at issue in this case. *See* Alaska Count I Memorandum at 15-21. An assertion of this power, Alaska contends, demonstrates that the United States viewed the waters of the Archipelago as inland waters. Before describing the exhibits that Alaska cites, the State's theory requires some explanation.

Alaska appears to start with the assumption that a coastal nation generally may not regulate fishing by foreign nationals on the high seas. *See supra* part I.B (discussing the distinctions between high seas, territorial sea, and inland waters). Alaska then infers that if the United States enforced fishing regulations on the waters overlying the pockets and enclaves of submerged lands, the United States could not have viewed the waters as high seas. Moreover, because the submerged lands lie more than three miles from shore, they also could not qualify as territorial sea. Accordingly, Alaska reasons, the United States must have viewed the waters as inland waters. *See* Alaska Count I Memorandum at 16.

The United States disagrees with Alaska's theory for two reasons. First, it asserts that a nation may establish historic inland waters only by asserting the power to exclude foreign vessels and navigation. Regulating fishing, in the United

States' view, does not suffice. *See* U.S. Count I Opposition at 18. Second, it asserts that, even if fishing regulations are relevant and probative, Alaska cannot show that the United States consistently enforced fishing regulations against foreign nationals within waters overlying the pockets and enclaves of submerged lands lying more than three miles from shore. *See id.* at 18-19.

This section of the report describes the exhibits regarding the enforcement of fishing regulations. The report assesses below their significance under the governing legal standards for historic inland waters. *See infra* part II.D.

(1) *The Marguerite Incident.* Shortly after the Alaska Boundary Tribunal arbitration, Congress enacted the Alien Fishing Act of 1906, 34 Stat. 263 (1906), to regulate fishing in the "waters of Alaska." In *Alaska (Cook Inlet)*, the Court decided not to rely on this Act in determining whether Cook Inlet contained inland waters. The Court stated:

> [The Alien Fishing Act] simply applied to "the waters of Alaska under the jurisdiction of the United States." 34 Stat. 263. The meaning of that general statutory phrase, as applied to Cook Inlet, can only be surmised, since there was not a single instance of enforcement to suggest that the Act was applicable to foreign vessels in the waters beyond the three-mile limit in lower Cook Inlet.

422 U.S. at 198. Alaska alleges that here, by contrast, the United States enforced the Alien Fishing Act against foreign nationals in waters of the Alexander Archipelago lying more than three nautical miles from any shore. Alaska cites the case of a Canadian vessel called the *Marguerite* as its only specific example. *See* Alaska Count I Memorandum at 17.

On July 22, 1924, the United States Coast Guard seized the schooner *Marguerite* for fishing or attempting to fish in the Alexander Archipelago in violation of the Alien Fishing Act of 1906. *See* Memorandum of Albert Nelson, Commanding Officer, the *Smith* to Commandant, U.S. Coast Guard (July 22, 1924) [hereinafter Coast Guard Report] (Exhibit AK-33). The Canadian master of the vessel denied that he was fishing in United States waters, but pleaded guilty to attempting to fish and paid a $100 fine. *See* Letter from Henry Chilton, British Envoy to Frank B. Kellogg, Secretary, U.S. Dep't of State at 1-2 (July 22, 1925) (Exhibit AK-34) [hereinafter British Inquiry]. The master later said that he paid the fine so that he could return to Canada before his fish spoiled. *See id.* The master then requested that British authorities file a protest. Britain inquired about the incident, *see id.*, and the United States responded that the seizure was proper because the master was attempting to fish "in that part of the waters of the Dixon Entrance which [is] within the jurisdiction of this Government." *See* Letter from Joseph C. Grew to Henry Chilton, Britsh Envoy at 1 (Dec. 23, 1925) [hereinafter Response to Inquiry] (Exhibit AK-35). Britain took no further action.

The record does not establish with clarity where the Coast Guard seized the *Marguerite*. The master of the vessel alleged that the incident took place more than five miles from land, which would put the vessel in a pocket or enclave within the Archipelago. *See* British Inquiry, *supra*, at 1. The United States, however, never agreed with this allegation.

The initial Coast Guard report said that the seizure occurred "seven miles W.S.W. of Tree Point, Alaska, and seven and one half miles north of the bound[a]ry line." Coast Guard Report,

supra, at 1. This report offers no help in pinpointing the location. As the United States demonstrates in its briefs and exhibits, the place described in the report does not exist. *See* U.S. Count I Opposition at 19. No point seven miles west southwest of Tree Point can be seven and a half miles north of the boundary line between Canada and the United States because Tree Point is less than seven and a half miles north of the boundary. *See Alaska Atlas and Gazetteer* 16-17 (2001) (DeLorme Publishing Co.) (map of scale 1:300,000 (1 inch = approximately 4.1 nautical miles) showing area near Tree Point) (Exhibit US-I-20).

When the State Department responded to Britain, it said that the seizure occurred "north of a line drawn from Yellow Rocks to Tree Point." Response to Inquiry, *supra*, at 1. This statement also does not clarify whether the incident occurred within a pocket or enclave because many points north of a line from Yellow Rocks to Tree Point lie within three miles of land. *See Alaska Atlas and Gazetteer*, *supra*, at 16-17 (Exhibit US-I-20). As a result, the available documents regarding the *Marguerite* incident do not establish that the United States enforced fishing regulations against foreign nationals in the pockets or enclaves more than three miles from the shore.

(2) *1926 and 1928 Fishing Regulations*. In 1926 and 1928, the United States Department of Commerce adopted fishing regulations concerning southeastern Alaska. *See Laws and Regulations for the Protection of Fisheries of Alaska* 19, U.S. Dep't of Commerce Circ. No. 251 (13th ed. 1926) (Exhibit AK-36); *Laws and Regulations for the Protection of Fisheries of Alaska* 19, U.S. Dep't of Commerce Circ. No. 251 (15th ed. 1928) (Exhibit AK-37). Alaska asserts that the United States

enforced these regulations against foreign nationals. *See* Alaska Count I Memorandum at 18. To support this proposition, the State cites comments made by former fishery enforcement officials before a 1972 Senate Committee studying the Alaska boundary. *See Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries: Hearing Before the Committee on Commerce*, Serial No. 92-69 (Exhibit AK-38). These officials made broad statements to the effect that foreign fishing was prohibited everywhere in the Archipelago. One official said that the prohibition on foreign fishing covered "all waters extending 3 miles seaward from lines extending from headland to headland across all bays, inlets, passes, straits, and entrances in Southeast Alaska." *Id.* at 25 (affidavit of Fred Headlee). The officials mentioned several incidents involving foreign vessels, but the United States correctly points out that these incidents do not appear to have occurred within the pockets and enclaves at issue in this case. *See* U.S. Count I Opposition at 19 n.6.

(3) *Position of Department of Commerce*. Alaska asserts that in 1930 the Bureau of Fisheries (then part of the Department of Commerce) took the position that waters of the Archipelago lying between headlands less than ten miles apart were inland waters. It cites a brief telegram from the Bureau to an enforcement official saying: "Interior coastal waters cease to be International waters at and above place where distance from headland to headland is less then ten nautical miles Stop This means that central part Chatham Strait at least as far north as latitude Point Patterson is International waters except for area three miles from shore on each side Stop." Telegram from Radcliffe to Russell (Sept. 8, 1930) (Exhibit AK-39).

The United States, however, points out that the Department of Commerce soon stated a different view. In 1934, the Department confirmed that "Canadian fisherman may operate north of the line 'AB' so long as they remain outside the three mile limit."[27] *See* Letter from Daniel C. Roper, Secretary, U.S. Dep't of Commerce to Secretary, U.S. Dep't of State at 1 (Sept. 5, 1934) (Exhibit US-1-14). In 1934, Under Secretary of State William Phillips acknowledged the validity of this position, writing back:

> I have received your letter of September 5, 1934, and am gratified that you concur in the views expressed in my letter of August 29, 1934, that the waters north of a line from Cape Muzon to Portland Canal laid down by the Alaskan Boundary Tribunal in 1903 are high seas except within the three-mile limit.
>
> I appreciate your assurance that the Fishery laws and regulations will be enforced by the Bureau of Fisheries in conformity with the view that Canadian fishermen may operate north of line AB so long as they remain outside the three-mile limit.

Letter from William Phillips, Under Secretary, U.S. Dep't of State to Secretary, U.S. Dep't of Commerce at 1 (Sept. 13, 1934) (Exhibit US-I-14). The United States interprets this letter to show that the Secretary of State and Secretary of Commerce did not believe that the waters of the Alexander Archipelago

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[27]The AB Line is a line, designated at the Alaska Boundary Tribunal, running from Cape Muzon to Portland Canal. *See infra* part II.C.4.d.

were inland waters. *See* U.S. Count I Opposition at 2-3. The Special Master agrees with this interpretation.

(4) *Position of the Department of Interior.* From 1940 through 1956, Department of Interior regulations claimed jurisdiction over "all territorial waters" of Alaska. Fish & Wildlife Serv., U.S. Dep't of Interior, *Laws and Regulations for Protection of Fisheries of Alaska* 45 (1950) (Exhibit AK-52). *See also* Alaska Count I Memorandum at 19 nn. 6 & 7 (citing additional versions of the regulations claiming jurisdiction over "territorial, coastal and tributary waters"). In 1955, the Chief of the Branch of Alaska Fisheries within the Department of Interior, said that these waters included:

> All waters for a distance 3 miles seaward (1) from the coast and lines extending from headland to headland across all bays, inlets, straits, passes, sounds, and entrances, and (2) from the shores of any island or group of islands, including the islands of the Alexander Archipelago and the waters between such groups of islands and the mainland.

See Memorandum from Seton H. Thompson, Chief, Branch of Alaska Fisheries to Administrator, Alaska Commercial Fisheries, Juneau at 1 (Nov. 23, 1955) (Exhibit AK-59). The following year, the Department of Interior adopted this interpretation in a formal regulation. *See* 50 C.F.R. § 101.19 (1957) [Exhibit AK-60].

The second clause of this broad definition would include all the waters that Alaska claims as inland waters. Alaska, however, has not identified any instances in which the United States actually enforced these regulations against foreign nationals within the pockets and enclaves at issue in this case.

(5) *Co-ordination of Fisheries Regulations*. In 1957, Canada and the United States held a conference on the "Co-ordination of Fisheries Regulation." *See Alaska (Cook Inlet)*, 422 U.S. at 194-196 (describing this conference). The two countries discussed prohibiting their citizens from fishing with nets for salmon in international waters in the North Pacific. *See id.* at 194. During their negotiations, they agreed that "[t]he line described in the Alaska Fisheries Regulation [*i.e.*, 50 C.F.R. § 101.19 discussed above] was appropriate." *Summary of Proceedings* 7, Conference on the Co-Ordination of Fisheries Regulation Between Canada and the United States (1957) (Exhibit AK-63). The Court, however, previously has held that the United States and Canada agreed to this line for the purpose of fisheries management rather than defining the territorial sea. *See Alaska (Cook Inlet)*, 422 U.S. at 195-196 & n.16.

c. League of Nations Conference

In 1930, the League of Nations sponsored the Conference for the Codification of International Law which met in the Hague. The Court previously addressed this conference in *Alaska (Arctic Coast)*, 521 U.S. at 16-18. At the conference, the United States made proposals regarding the treatment of straits, bays, and waters surrounding fringing islands.

(1) *Straits Leading to Inland Waters Proposal*. One rule proposed at the 1930 conference concerned the treatment of straits leading to inland waters. The proposed rule applied to straits with entrances less than ten miles wide. In *Alaska (Arctic Coast)*, the Court described the proposed rule as follows:

> Where [such] a strait was "merely a channel of communication with an inland sea," rules regarding closing of bays would apply. . . . Under those rules, waters shoreward of closing lines less than 10 nautical miles in length would be treated as "inland" waters.

Alaska (Arctic Coast), 521 U.S. at 16 (quoting the proposal, citations omitted).

The parties interpret this proposal in different ways. Alaska asserts that, consistent with the United States' position at the 1903 Alaska Boundary Tribunal, the rule would require characterizing the waters of the Alexander Archipelago as inland waters. *See* Alaska Count I Opposition at 25. The United States, in contrast, believes that the rule would not apply to the Alexander Archipelago. It reasons that the Archipelago "consists of a network of straits providing multiple passages to and from the high seas," and not just straits that are merely channels of communication with inland waters. *See* U.S. Count I Memorandum at 36.

In the view of the Special Master, this proposal by itself does not answer the question whether the United States was adhering to the position taken at the 1903 Alaska Boundary Tribunal. As the United States says, a number of straits in the Alexander Archipelago connect one area of high seas to another area of high seas. For example, straits connect the Dixon Entrance to the Northern Gulf of Alaska. The Proposal, however, also does not repudiate the position of the United States at the 1903 Alaska Boundary Tribunal arbitration.

(2) *Assimilation Proposal*. Another proposal at the 1930 Conference said that the mainland and all islands would be assigned three-mile belts of territorial sea. If these belts

produced pockets of high seas completely surrounded by territorial sea, then the pockets would be "assimilated" to (i.e., treated as) the territorial sea. *Alaska (Arctic Coast)*, 521 U.S. at 16. The rationale was that isolated pockets of high seas would serve no useful purpose for navigation. *Id.*

The United States and Alaska interpret this proposal in different ways. The United States argues that this proposal repudiates the position that closing lines should join the outer islands of the Alexander Archipelago and that all waters behind those closing lines should be treated as inland waters. *See* U.S. Count I Memorandum at 35. It reasons that, under the proposal, closing lines would not be not drawn between islands. In addition, the waters surrounding the islands would not be treated as inland waters, but instead as the territorial sea.

Alaska disagrees. It says that the United States also proposed a rule at the conference for preserving historic inland waters claims. *See* Alaska Count I Opposition at 25-26. Accordingly, Alaska contends that the assimilation proposal did not repudiate any earlier claims that the waters of the Alexander Archipelago are inland waters. *See id.* at 26.

The Special Master agrees with the United States' interpretation. The United States did not claim at the 1903 Alaska Boundary Tribunal arbitration that the waters of Alexander Archipelago were historic inland waters. Instead, it simply said that they were inland waters based on a theory about drawing closing lines between islands. The proposal at the Conference, moreover, did not provide new grounds for thinking that the waters should have the status of historic inland waters. On the contrary, under the proposals, the United States would treat

most of the waters in the Alexander Archipelago as territorial sea.

d. A-B Line Negotiations with Canada

At the 1903 Alaska Boundary Tribunal, the United States and Britain drew a line at the southern end of the Alexander Archipelago which they called the "A-B line." The A-B line runs from near Cape Muzon on the southern tip of Prince of Wales Island to Portland Canal on the mainland. The United States and Canada agreed that islands and rocks north of the A-B line would belong to the United States, while islands and rocks south of the line would belong to Canada. *See Alaska Atlas and Gazetteer*, *supra*, 16-17 (Exhibit US-I-20) (showing a portion of this line and some of the islands and rocks that it separates).

In the 1930s and 1940s, the United States and Canada sought to settle the question whether the A-B line merely divided the islands and rocks between the two nations, or also fixed "the limits of sovereignty of all contiguous American and Canadian territory, including territorial waters as well as land." S. Whittemore Boggs, *Alaska-Canada Boundary at the Dixon Entrance* 2 (Jul. 24, 1933) (Exhibit AK-64) [hereinafter 1933 Boggs Memorandum]. Alaska has identified several statements and proposals made during negotiations over this question. Although the United States and Canada never concluded an agreement on the matter, Alaska interprets these statements to mean that the United States claimed the waters of the Alexander Archipelago as inland waters.

(1) *State Department Memorandum*. In 1933, State Department Geographer S. Whittemore Boggs wrote a long memoran-

dum regarding the negotiations over the A-B line. *See id.* In the memorandum, he noted that Canada claimed that its territory included two waterways lying immediately south of the A-B line called Dixon Entrance and Hecate Strait. Explaining why the United States should oppose this view, Boggs said:

> It can not be admitted, however, that the waters of Dixon Entrance and Hecate Strait are Canadian. The protection of American navigation rights of access to *important inland waters* of southeastern Alaska (especially through Dixon Entrance), and of American fishing rights in the waters of both Dixon Entrance and Hecate Strait outside the 3-mile limit, require that it be maintained that the waters of both bodies are high seas.

Id. at 33 (emphasis added). Boggs attached a map ("Map No. 1") designating the "inland navigation routes" of the Inland Passage leading through Dixon entrance into the Alexander Archipelago. This navigation route passes through waters in the Alexander Archipelago more than three nautical miles from any coast. *See id.* at 19 & Map No. 1 (included with Exhibit AK-64).

Alaska and the United States disagree about the meaning of these statements. Alaska asserts that the quotations, combined with the map, indicate that Boggs viewed the waters of the Archipelago as inland waters. *See* Alaska Count I Memorandum at 22. The United States disagrees. The United States says that the terms "Inland Passage" and "inland navigation routes" have no jurisdictional connotation but merely refer to the sheltered characteristics of the waters. *See* U.S. Count I Opposition at 25. In addition, the United States says that even if Boggs correctly recognized that the Alexander Archipelago

contains some "important inland waters," his statement does not imply that he believed that all of the waters of the Archipelago were inland waters. *See id.*

The Special Master agrees with the United States' arguments. In addition, the Special Master sees another ground for rejecting Alaska's interpretation of the 1933 Boggs Memorandum. Specifically, Alaska has overlooked a second map ("Map No. 2") depicting Boggs's view of the American and Canadian "Territorial Waters." Map No. 2 shows that Boggs supported the three-mile arcs-of-circles method of measuring the territorial sea and that he did not regard the waters of the Alexander Archipelago as inland waters. In his memorandum, Boggs explained Map No. 2 as follows:

> Accompanying Map No. 2 has drawn upon it in a continuous blue line the limits of American territorial waters, and in a broken red line the limits of Canadian territorial waters, as it seems to me they ought to be drawn. These lines are envelopes of arcs of circles of three nautical miles radius.

See 1933 Boggs Memorandum, *supra*, at 19-20. Map No. 2, as Boggs says, contains dark arcs surrounding the islands in the Alexander Archipelago. *See id.* Map No. 2 (included with Exhibit AK-64). The map does not designate all of the waters of the Alexander Archipelago as inland waters.

(2) *Proposed United States-Canada Convention.* In 1938, Boggs and State Department Assistant Legal Adviser William R. Vallance met with Canadian officials for further discussions about the boundary. *See* S. Whittemore Boggs & William R. Vallance, *Report Regarding Conferences Concerning the United States-Alaska-Canada Boundary Held in Ottawa, June*

27-29, 1938 (Jul. 30, 1938) (Exhibit AK-65). During their meetings, they discussed a draft of a proposed treaty or convention. One article of this draft said that "the waters of Dixon Entrance have been under the exclusive jurisdiction of the high contracting parties." *Id.* at 24. The article then said that each party granted the other party "the right to fish, to transport cargoes of every nature in ships registered under the flag of the high contracting party," and said that "their ships, including war vessels, shall at all times have complete freedom of transit and entry or departure with respect to said waters." *Id.* at 24-25.

A later draft prepared by Boggs modified the first sentence of the same article to say that "the waters of the Dixon Entrance constitute historic waters which are under the exclusive jurisdiction of the high contracting parties." S. Whittemore Boggs, *Draft Article for Proposed U.S.-Canada Boundary Convention* 1 (June 24, 1939) (Exhibit AK-66). In 1940, the United States prepared another draft agreement or understanding. One clause said:

> Having in mind the measures being taken jointly and severally by the two Governments for the defense of the northern half of the Western Hemisphere, the Government of the United States and the Government of Canada agree that, *should either country hereafter declare that the doctrine of historic waters shall be applied to any part of [the] waters contiguous to the coasts of Alaska or British Columbia*, within the various bays, straits, sounds, entrances, and inlets, *such waters shall continue to be open to the vessels, aircraft, and nationals of the two countries* . . . .

Proposed Note from the American Minister at Ottawa to the Canadian Secretary of State for External Affairs at 1 (Sept. 28, 1940) (Exhibit AK-69, at HW 00402) (emphasis added). Canada responded in 1943 with a counter-proposal, containing the same provision. *See* Letter from Lewis Clark, U.S. Legation to J.D. Hickerson, U.S. Dep't of State (May 5, 1943) (including Canadian draft) [hereinafter Canadian Counter-Proposal] (Exhibit AK-70 at HW 00424). Although both the United States and Canada at the time seemed eager to settle the matter, no agreement was ever reached.

Alaska asserts that the quotations above "provided that the United States and Canada *would claim* as historic waters" the bays, straits, sounds, entrances, and inlets contiguous to Alaska and British Columbia. Alaska Count I Memorandum at 23 (emphasis added). The Special Master disagrees with this interpretation. The last version of the proposed convention says that "should" either nation claim the waters as historic waters, then both nations still would permit navigation. The text does not say that either nation actually did claim or in the future would claim the waters as historic waters.

In addition, as Alaska itself concedes, *see id.* at 25, the United States and Canada never formally agreed to a final convention. Thus, whatever the persons working on the drafts may have agreed, their views did not necessarily reflect the position of their governments. Foreign nations, moreover, may not have known of their views.[28]

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[28]The record does not reveal when the drafts of the proposal became public. An unexplained notation at the bottom of Alaska's exhibits indicates that they became declassified in 1999.

(3) *Definition of Dixon Entrance and Adjacent Waters.* In 1944, in response to the United States' proposals regarding the A-B line, Canada made a counter-proposal. This counter-proposal contained a definition of Dixon Entrance and its adjacent waters. The definition said:

> It is further agreed that the waters of the Dixon Entrance include the waters south of the line AB and north of a line drawn between the Canadian Geodetic stations Tow Hill on Graham Island and Stephens on Stephens Island; and that, for the purpose of this Agreement, the *adjacent waters* include the waters of Revillagigedo Channel South of the lighthouse on Mary Island; and of Clarence Strait south of Wedge Island; and of Cordova Bay south of Kaigani Point; and of Hecate Strait south of a line drawn between Tow Hill and Stephens; and the waters between a straight line from Cape Muzon and Langara Point and the high seas.

See Canadian Counter-Proposal, *supra,* at 2 (emphasis added) (Exhibit AK-70, at HW 00425).

Alaska notes that the State Department contemplated two changes to this definition. First, State Department Geographer Boggs proposed in an internal memorandum that the term "adjacent waters" should be changed to "national waters." Memorandum of S. Whittemore Boggs at 1 (Aug. 1, 1944) (Exhibit AK-74, at HW 00495) [hereinafter 1944 Boggs Memorandum]. Alaska contends that the term "national waters" means inland waters. *See* Alaska Count I Memorandum at 24 (citing 1 Aaron Shalowitz, *Shore and Sea Boundaries* 303 (1962)) .

The Special Master disagrees with this interpretation. Boggs worried that the term "adjacent waters" might prove confusing because some of the waters were territorial sea and some were not. *See* 1944 Boggs Memorandum, *supra*, at 1. He said: "While we do not define 'national waters,' and while I do not believe that there will be found in international law any clear definition of the term which is applicable here, at least we eliminate some of the ambiguity." *Id.* This statement makes clear that he was not equating the terms "adjacent waters" with "inland waters."

Second, internal State Department documents discussed removing references to some of the islands mentioned in the quotation above. After tentatively endorsing their removal, Boggs changed his mind. In a very brief note affixed to one proposed draft, he wrote:

> I readily agree with Mr. Hackworth's suggestion that the references to Mary Island, Wedge Island, and Kaigani Point be restored. It seemed to me merely superfluous because the envelopes of arcs of three-mile radius close off territorial waters to the south of each of these three. There is no objection whatever to including them, especially as Mr. Hackworth wants to make sure *that there is no basis for Canadian nationals entering waters farther north*. Geographically, I do not see how there can really be any possibility of such an interpretation, but certainly there is no harm in making it foolproof.

Memorandum of S. Whittemore Boggs, Geographer, U.S. Dep't of State at 1 (Aug. 26, 1944) (Exhibit AK-76 at HW 00487) (emphasis added). Alaska says that this memorandum shows that "Boggs necessarily considered all the waters of the

Archipelago 'farther north' of Wedge Island to be inland waters." Alaska Count I Memorandum at 25.

The Special Master also disagrees with this interpretation. Although Boggs mentions waters "farther north," the context does not indicate whether he meant all of the waters of the Archipelago, or just some of them. In addition, Boggs could not speak for the United States government by attaching informal comments to a proposed convention that the United States ultimately never entered.

e. Position of the State Department

The State Department had several important occasions to express its views on the waters of the Alexander Archipelago in contexts other than negotiations over the A-B line.

(1) *Tariff Commission.* In 1930, State Department Geographer Boggs met with an official of the U.S. Tariff Commission to discuss the boundaries of the United States and Alaska for the purpose of a Tariff Commission investigation. Following the meeting, Boggs wrote a memorandum describing their conclusions. In the memorandum, he said:

> It was agreed that for the purposes of the investigation being made by the Tariff Commission, it would be best to represent the limit of American territorial waters as the envelope of the arcs of circles drawn from all points on the Alaskan coast, including such envelopes as overlap the straight line from Cape Muzon to the mouth of the Portland Canal [*i.e.*, the AB line], except where they overlap the arcs of circles similarly drawn from Canadian land.

S. Whittemore Boggs, *Alien Fishing in Territorial Waters and on the High Seas* 3 (Aug. 5, 1930) (Exhibit US-I-9).

The United States and Alaska disagree about the meaning of this statement. The United States says that the statement shows that Boggs did not treat the waters of the Alexander Archipelago as inland waters, but instead used arcs of circles to surround islands and the mainland with belts of the territorial sea. *See* U.S. Count I Memorandum at 36 & n.18. Alaska, in contrast, says that the letter represents the Tariff Commission's point of view for the purposes of the study, and not a statement of the United States' position on the territorial sea. *See* Alaska Count I Opposition at 28.

The Special Master agrees with Alaska's interpretation. Boggs phrased his summary in a way suggesting that he did not want to make a general statement in this memorandum about the territorial jurisdiction of the United States. He said that the representation of the limit of territorial waters was "for the purposes of the investigation being made by the Tariff Commission."

(2) *Coast Guard.* In 1952, the Coast Guard asked the State Department to answer questions about Alaska. In response to one of the questions, Boggs wrote:

> With reference to "Question 1", it is the position of this Government that the territorial waters of Alaska are everywhere the waters within the envelope of arcs of circles whose radius is 3 nautical miles measured outwardly from the coast line, including all islands—properly from the intersection of the line of the low-water datum with the shore. They will therefore not include some of the waters measured "3 miles seaward

from a line connecting headland to headland regardless of distance between them," as assumed in "Question 1". Letter from S. Whittemore Boggs, Geographer, U.S. Dep't of State to Vice Admiral O'Neil, Commandant, U.S. Coast Guard at 1 (Aug. 1, 1952) (Exhibit US-I-10).

The United States and Alaska disagree about the meaning of this statement. According to the United States, this statement shows that Boggs believed that (a) 10-mile closing lines should not be drawn to enclose inland waters; (b) the waters of the Archipelago are not straits leading to inland waters; and (c) the waters also are not historic inland waters. *See* U.S. Count I Memorandum at 37. Alaska, in contrast, says that Boggs's meaning is ambiguous because he used the word "territorial waters" rather than "territorial sea." It asserts that the term "territorial waters" can refer to both inland waters and the territorial sea. *See* Alaska Count I Opposition at 29.

The Special Master agrees with Alaska that the term "territorial waters" may include both the territorial sea and inland waters. *See supra* part I.B. The quotation in Boggs's letter, however, reveals that Boggs advocated using an arcs of circles measurement for the "territorial waters." Measuring the waters in this manner would have served no purpose if Boggs believed that the islands could be joined by closing lines and that all the waters behind those lines could be treated as inland waters. For this reason, the Special Master agrees with the United States' interpretation of Boggs's letter.

(3) *Diplomatic Correspondence with Norway*. In 1949, in diplomatic correspondence, the United States told Norway that it was adhering to the proposals that it had made at the 1930 League of Nations Conference in the Hague. *See* Alaska

Report, *supra*, at 78-79 (quoting the United States' statement). Special Master J. Keith Mann concluded that this memorandum showed that the "Hague proposals became the official international position of the United States." *Id.* at 79. As explained above, those proposals do not support the view that the United States was claiming the waters of the Alexander Archipelago as inland waters. *See supra* part II.C.4.c.

f. Hearings on Statehood Legislation

Alaska became a state on January 3, 1959. Alaska contends that statehood legislation contemplated that Alaska would gain full jurisdiction over the waters of the Alexander Archipelago. *See* Alaska Count I Memorandum at 26. Alaska supports this contention by citing several statements made by Senator Guy Cordon during a committee hearing on the Alaska Statehood Act. To ensure that the boundaries of Alaska would include territorial waters, Senator Cordon proposed saying in the Act: "The State of Alaska shall consist of all the territory, together with territorial waters appurtenant thereto, now included in the Territory of Alaska." *Hearings before the Sen. Comm. on Interior and Insular Affairs on S. 50, A Bill to Provide for the Admission of Alaska into the Union*, 83d Cong. 222 (Exhibit AK-78) [hereinafter *ASA Hearings*]. This statement became section 2 of the Alaska Statehood Act. *See* Alaska Statehood Act, Pub. L. 85-508, § 2, 72 Stat. 340, 340-341 (codified at 48 U.S.C. Note Prec. § 21) [hereinafter ASA]. Senator Cordon specified that Alaska's boundaries would extend to the "3-mile limit that this country has contended for always." *ASA Hearings*, *supra*, at 223. As a result, Senator Jackson later said

Alaska would include "everything there is up there, as far as the overall boundary lines are concerned." *Id.* at 282.

The Special Master disagrees with Alaska's interpretation. These comments do not prove that Senator Cordon, Senator Jackson, or anyone else viewed all of the waters of the Alexander Archipelago as inland waters. The comments do not appear to focus on the Alexander Archipelago and do not specify exactly where the boundaries of Alaska would lie.

Moreover, in part of the hearing that Alaska does not cite, Elmer F. Bennett, a legislative counsel from the Department of Interior, called the problem of historic bays to Senator Cordon's attention. Bennett said: "You have one additional problem, as brought out in your record here, in that the historic bays are considered as part of Territorial waters, and the State Department apparently has refused to recognize any of the bays in Alaska." *Id.* at 223. Senator Cordon responded: "If we attempt in this or any act of this kind to go into that field, gentlemen, it will be a year from some Thursday when we could report any kind of bill." *Id.* Even if legislative history of this kind has relevance, Senator Cordon apparently did not wish to express any view on whether Alaskan waters included historic inland waters. Others may have shared his view.

g. General Policy Regarding Coastal Islands

Alaska asserts that prior to statehood, the United States adhered to a general policy that coastal islands less than ten nautical miles apart enclose inland waters. *See* Alaska Count I Memorandum at 31. The State relies on the *Alabama and Mississippi Boundary Case*, 470 U.S. at 106 (footnote omitted), and other sources to establish the existence of this policy.

See Alaska Count I Memorandum at 31-36. Alaska acknowledges that this policy, by itself, does not demonstrate that the waters of Alexander Archipelago are historic inland waters. *See id.* at 31. It contends, however, that this ten-mile policy provides "powerful confirmation of the body of evidence demonstrating the United States has continuously claimed dominion over the waters of the Archipelago and has done so with the acquiescence of foreign nations." *Id.* The United States argues that the Court rejected the predicate for this contention in *Alaska (Arctic Coast)*. *See* U.S. Count I Opposition at 17.

The Special Master agrees with the United States. In the *Alabama and Mississippi Boundary Case*, the Court considered the status of the waters of Mississippi Sound. In its analysis, the Court said that, prior to adopting the Convention, the United States had a general policy "of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles." 470 U.S. at 106. The Court ultimately concluded that Mississippi Sound contained historic inland waters. *See id.* at 115. In *Alaska (Arctic Coast)*, however, the Court characterized the quoted statement from the *Alabama and Mississippi Boundary Case* as incorrect dicta. The Court said that the statement was not controlling because the *Alabama and Mississippi Boundary Case* had relied on specific assertions of sovereignty rather than on the supposed ten-mile policy in reaching its holding. *See* 521 U.S. at 13-14. Moreover, after examining a variety of evidence including contrary positions taken at the 1930 League of Nations Conference, the Court concluded that the United States did not have a "firm and

continuing 10-mile rule" for inland waters. *See id.* at 20. Given that the asserted ten-mile policy never firmly existed, the policy cannot confirm that the United States considered the Alexander Archipelago to contain inland waters.

b. United Nations Studies

The United States has cited two United Nations studies to support its position that other nations did not consider the waters of the Alexander Archipelago to be inland waters.

(1) *Study of Archipelagos*. In 1958, the United Nations sponsored a Conference on the Law of the Sea. In preparation for the conference, Mr. Jens Evensen of Norway prepared a study of the treatment of archipelagos for the United Nations. In a section entitled "State Practice Concerning Coastal Archipelagos," Evensen described the position of the United States as follows:

> This country has been one of the staunchest advocates of the view that archipelagos, including coastal archipelagos, cannot be treated in any different way from isolated islands where the delimitation of territorial waters is concerned. Thus, according to information received, the practice of the United States in delimiting, for example, *the water of the archipelagos situated outside the coasts of Alaska is that each island of such archipelagos has its own marginal sea of three nautical miles*. Where islands are six miles or less apart the marginal seas of such islands will intersect. But not even in this case are straight baselines applied for such delimitation.

Jens Evensen, *Certain Legal Aspects Concerning The Delimitation of The Territorial Waters of Archipelagos* 24, United

Nations Conference of the Law of the Sea, A/CONF.13/18 (Nov. 29, 1957) (emphasis added) (Exhibit US-I-3).

Several facts concerning this document are undisputed. First, Evensen believed that the waters of the Alexander Archipelago were not inland waters. Second, the report was not stating the official views of the United Nations Secretariat. Third, the United States did not object or otherwise indicate disagreement with report. Fourth, Evensen did not cite any sources or indicate the authority for his observations. *See* U.S. Count I Memorandum at 37-38; Alaska Count I Opposition at 29-31; U.S. Count I Reply at 13-14. The Special Master assesses the legal significance of Evensen's views below. *See infra* part II.D.1.a.

(2) *Study of Historic Bays*. In 1957, the Secretariat of the United Nations prepared a study of historic bays. *See* Secretariat, United Nations, *Historic Bays*, A/CONF.13/1 (Sept. 30, 1957) (Exhibit US-I-13). This study describes numerous historic bays around the world, including Chesapeake Bay and Delaware Bay. *See id.* at 4-5. The study, however, does not identify the waters of the Alexander Archipelago as a historic inland bay.

5. Post-Statehood Period from 1959-Present

Alaska became a state in 1959. The United States and Alaska have identified various post-statehood documents and other materials that they consider helpful to their positions.

a. The *Organized Village of Kake* Decision

The parties have cited the decision in *Organized Village of Kake v. Egan*, 174 F. Supp. 500 (D. Alaska, Terr., 1st Div.

1959), *aff'd sub nom. Metlakatla Indian Community, Annette Island Reserve v. Egan*, 362 P.2d 901 (Alaska 1961), *vacated in part*, 369 U.S. 45 (1962), *and aff'd in part sub nom. Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). This case concerned the powers of the newly admitted State of Alaska and the federal government to regulate salmon fishing. Alaska attempted to ban the use of fish traps for taking salmon for commercial purposes "in all the coastal waters of the state." 174 F. Supp. at 504. Certain native Alaskan communities claimed authority, derived from orders of the Secretary of Interior, to operate such traps, and they sought an order enjoining state officials from enforcing the fish trap ban against them. *See Metlakatla Indian Community*, 362 P.2d at 902. The United States participated in the case as *amicus curiae*. *See id.* The trial court held that the Secretary of Interior had no authority to create an exception to the fish trap ban and dismissed the plaintiffs' action. *See Organized Village of Kake*, 174 F. Supp. at 505.

The parties have observed that the trial court made the following oral ruling in the case:[29]

> I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

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[29]The trial court made its decision orally because of the urgency of time, attempting to "do as well as possible" under the circumstances. *Id.* at 501.

Id. at 502. Citing the quoted statement, Alaska says that the trial court "declared that the waters of the Archipelago are 'inland waters over which the State of Alaska has dominion.'" Alaska Count I Memorandum at 37.

The United States disagrees. It notes that the trial court subsequently explained in its ruling that Alaska had acquired title to the lands through the Submerged Lands Act's cession of submerged lands beneath the three-mile territorial sea. *See* U.S. Count I Opposition at 31 (citing 174 F. Supp. at 502). The United States concludes that the reference to the Submerged Lands Act shows that the trial court was using the term "inland waters" to mean "both inland waters proper and territorial seas." *Id.*

The language used by the trial court in its oral opinion is ambiguous. Later proceedings in the case, however, resolved this ambiguity. Although neither party addresses these later proceedings in its briefs, the trial court subsequently made supplemental findings of fact, and the case then went to the Alaska Supreme Court and the United States Supreme Court, both of which issued written opinions.[30]

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[30]The *Kake* case has a very unusual procedural history. At the time of the trial court's decision, July 2, 1959, Alaska had just become a state and did not have a fully organized judiciary. The trial court was "to a significant degree the creature of two sovereigns acting cooperatively to accomplish the joint purpose of avoiding an interregnum in judicial administration in the transitional period." *Metlakatla Indian Comm., Annette Island Reserve v. Egan*, 363 U.S. 555, 558 (1960). Because the Supreme Court of Alaska did not yet exist, the plaintiffs appealed directly to the United States Supreme

The trial court's supplemental findings of fact merit extensive quotation because they directly address the status of the waters of the Alexander Archipelago. The trial court's "Supplemental Finding of Fact No. 1" said:

> The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and *bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon* and ending at a line drawn from the northermost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects

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Court. On June 20, 1960, the Court reserved decision on the merits of the case and directed the plaintiffs to pursue appeals to the newly formed Supreme Court of Alaska. *See id.* at 562-63; *Metlakatla Indian Comm., Annette Island Reserve v. Egan*, 362 P.2d at 902. The case proceeded to the Supreme Court of Alaska and later returned to the United States Supreme Court.

These peculiar post-trial proceedings are difficult to find. Normal search procedures for case history in the WESTLAW electronic database do not reveal them (although normal search procedures do produce the subsequent history on LEXIS). Perhaps for this reason, the parties in their briefs did not cite or discuss the published opinions by the Supreme Court of Alaska or the United States Supreme Court. The United States first called this subsequent history to the Special Master's attention in a letter dated January 20, 2004. The letter provides only a citation of the later opinions; it does not discuss their content.

> the mainland, as more particularly described in 33 C.F.R. 82[.]275[31] *are all inland waters and historic bodies of water*. Because of historic, social, and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:
>
> That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in South central Alaska;

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[31]The cited regulation, 33 C.F.R. § 82.275, was promulgated by the Coast Guard on January 15, 1952, for the purpose of "establish-[ing] a definite line of demarcation between the inland waters and the high seas in southeastern Alaska." 17 Fed. Reg. 717 (1952). The regulation specified a demarcation line that ran along the outside of the Alexander Archipelago. Apart from a minor change in the spelling of one place name in 1966 and the substitution of "Light" for "Lighthouse" and "Light Station," *see* 31 Fed. Reg. 10319, 10323 (1966), this regulation appears to have remained in force for at least 25 years. The demarcation line determined the application of vessel piloting rules. *See* 17 Fed. Reg. at 717. Neither party has cited this regulation in its briefs. The Special Master notes that the Court held in *Louisiana* that a similar inland water demarcation line, also established as a navigational aid, did not serve as a territorial boundary. *See* 394 U.S. at 17-22.

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea;

That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fiords which exists today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

That the historical economy of the area involved is primarily oriented to a marine way of life in which the inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska.

Metlakatla Indian Community, 362 P.2d at 926 n.112 (quoting the trial court's Supplementary Findings of Fact) (emphasis and footnote added by the Special Master).

The trial court may have based its conclusion that the waters of the Alexander Archipelago are historic inland waters in part on an affidavit submitted by Edward L. Keithahn, the Curator and Librarian of the Alaska Museum and Library in Juneau,

Alaska. Based on his "intimate acquaintance with Alaskan history," Keithahn deposed:

That . . . the waters of the Alexander Archipelago from Dixon Entrance to Cape Spencer are waters over which first Russia, then the United States have exercised sovereignty which has not been successfully challenged for over 100 years; [and]

That the exercise of such sovereignty first by Russia and subsequently by Alaska and the United States over said lands and waters, as well as the historic background of the area have led to the conclusion that the said waters are historic bodies of water and inland waters of Alaska.

Affidavit of Edward L. Keithahn, *reprinted at* Transcript of Record, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), at 75-76.

The Supreme Court of Alaska agreed with the trial court's determination that the waters of the Alexander Archipelago are historic inland waters. In the course of a lengthy opinion that primarily concerned other matters, the Supreme Court of Alaska quoted the trial court's finding of fact and said:

Geographically and geologically the Alexander Archipelago of Southeastern Alaska has been determined to be a part of a long mountain range commencing with the Talkeetna Mountains in Southcentral Alaska, extending southeasterly to include the Wrangell and St. Elias Mountains. A partial inundation of the southeastern portion of the range resulted in the creation of arms of the sea and inland waterways without actually altering the original coastline facing the open sea. The trial court made Finding of Fact No. 1 based on the affidavit and

> attached exhibits of the Commissioner of Natural Resources of the State of Alaska. This finding establishes to our satisfaction that all of appellants' trap sites were located within the coastline and in inland waters of the state.

362 P.2d at 926-27 (footnotes omitted).

The United States Supreme Court affirmed the decision of the Alaska Supreme Court with regard to one of the native Alaskan communities but vacated and remanded with regard to another. *See Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (affirming); *Metlakatla Indian Community, Annette Islands Reserve v. Egan*, 369 U.S. 45 (1962) (vacating and remanding). The Supreme Court's opinions do not address the issue of whether the Alexander Archipelago contains historic inland waters.

Based on the entire history of the *Kake* case, the Special Master agrees with Alaska that the trial court determined that the waters of the Alexander Archipelago are inland waters in the legal sense. More importantly, although the State does not cite the decision in its briefs, the Supreme Court of Alaska came to the same conclusion. The Special Master assesses the legal significance of these decisions below. *See infra* part II.D.1.b.

b. The *United States v. California* Brief

In *California*, 381 U.S. 139 (1965), the Court considered the limits of inland waters in the area of seven coastal indentations

off the coast of California.[32] In a lengthy brief submitted to the Court, the United States addressed the Alexander Archipelago in two places. First, the United States responded to California's argument that the United States had endorsed closing lines greater than ten nautical miles in length within the Alexander Archipelago. The United States asserted that "[n]one of the closing lines actually described needs to exceed ten miles in length." California Answer, *supra*, at 106 (Exhibit US-I-6).

Second, and more importantly, the United States discussed its policy regarding straits leading to inland waters. The policy resembles the proposal that the United States made regarding straits at the 1930 League of Nations Conference. *See supra* part II.C.4.c.(1). The United States said:

> Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago (*supra*, pp. 105-107), straits leading to waters between Cuba and its encircling reefs and keys (*supra*, pp. 103-105), and

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[32]These indentations included Monterey Bay, San Pedro Bay, San Luis Obispo Bay, Santa Monica Bay, and waters located within segments of the coast from Point Conception to Point Hueneme and from the southern extremity of San Pedro Bay to the western headland at Newport Bay. *See* 381 U.S. at 213, apps. A-D (Black, J., dissenting) (illustrations depicting these areas).

Chandeleur Sound (*supra*, p. 110; see also, *infra*, pp. 153-155).

California Answer, *supra*, at 130-131 (footnote omitted). The United States then said that this policy, even in its most liberal applications, would not apply to any of the waters at issue in *California*. *See id.* at 131 n.105.

The parties have different views about the meaning the second quoted excerpt. Alaska asserts that the quotation unequivocally shows that the United States viewed the waters of the Alexander Archipelago as inland waters. *See* Alaska Count I Memorandum at 37-38. The United States reads the quotation merely as saying that the United States has not insisted on a right of innocent passage for its vessels when they travel through foreign straits that resemble the straits leading into the Alexander Archipelago. *See* U.S. Count I Memorandum at 29-30. It adds that the statement "does not *claim* the waters of the Alexander Archipelago as a bay, or even indicate which of the many straits of the Archipelago would qualify as inland waters if 'treated as a bay' under the bay closing rules that were applied in 1953." *Id.* at 30 (emphasis in original). In addition, the United States says that the excerpt "mistakenly" identified the Archipelago as a place having straits leading only to inland waters. U.S. Count Opposition at 31. In fact, it asserts, the Archipelago contains passages between undisputed areas of high seas, such as the passages leading from Dixon Entrance to the Northern Gulf of Alaska. *Id.* at 31-32.

The Court did not address this excerpt in the *California* opinion. In the view of the Special Master, the passage does not claim that all of the waters of the Alexander Archipelago are inland waters. It does suggest, however, that the United States

believed that at least some of them could be treated as bays under the standards that the United States expected from other nations.

c. The Pearcy Charts

Under article 4 of the Convention, a nation may choose to connect fringing islands using straight baselines and then may measure the territorial sea from these straight baselines. Article 4(1) of the Convention says:

> In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

Convention, *supra*, art. 4(1). In 1959, State Department Geographer G. Etzel Pearcy cited the "archipelago along the southeast coast of Alaska" as a "clear-cut example" of a place where article 4 could apply. *See* Pearcy, *supra*, at 971. Using article 4, he prepared charts depicting Alaska's territorial sea. *See id.* at 963 (describing the project). These charts show the limit of the territorial sea as surrounding the islands of the Alexander Archipelago. *See* Exhibits AK-103 & AK-38 (Pearcy's charts of different portions of the Alexander Archipelago).

The United States considers these charts irrelevant. It asserts that Pearcy was merely showing what the territorial sea would look like if the United States adopted the Convention and decided to employ straight baselines under article 4 of the Convention. *See* U.S. Count I Opposition at 32. The United States, however, did not adopt the Pearcy charts. As the Court

recognized in *Alaska (Arctic Coast)*, the United States has never chosen to draw straight baselines under Article 4 in Alaska or anywhere else. *See* 521 U.S. at 10.

Alaska has a different view. It notes that, even though the United States did not adopt Pearcy's charts in a formal manner, the State Department gave copies of the charts to the Coast Guard and the Department of Interior. *See* Alaska Count I Memorandum at 38. Both of these agencies, it says, used the charts for enforcement purposes. *See id.* at 38-39. Alaska contends that their actual use constitutes an inland waters claim. *See* Alaska Count I Reply at 26-27.

Alaska cites five letters written by United States officials regarding the Pearcy charts. The earliest three letters merely indicate that federal officials might use the charts in the future. One says that the charts "supposedly have no 'official standing,'" but commends their study because "they obviously will be the [basis] for determining the limits" of federal enforcement. Letter from Ronald C. Naab, Fisheries Management Supervisor, BCF to Regional Solicitor, BCF at 1 (Dec. 19, 1963) (Exhibit AK-105). Another says that the charts were provided to "determine the fishery resources which would be affected by the adoption of a straight base line method of determining territorial seas" and concluded that, despite minor disagreements of interpretation, they "were determined adequate" for law enforcement purposes. Letter from Ronald C. Naab, Fisheries Management Supervisor, BCF to the Regional Director, BCF at 1, 2 (Apr. 17, 1964) (Exhibit AK-106). A third letter recognizes that the charts have "no 'official standing'" but says that "the charts will be used for enforcement purposes." Letter from Regional Director Harry L. Rietze, Regional

Director, BCF to Director, BCF at 1 (Feb. 4, 1964) (Exhibit AK-107).

Only two letters say anything about the actual use of the charts. In 1967, a letter from a Coast Guard officer to Pearcy, said: "These charts represented an 'exercise in baseline drawing' and did not represent an official delineation of the territorial sea. However, the charts were useful as a guide for Coast Guard operational commanders when carrying out law enforcement activities." Letter from Captain W.A. Jenkins, Chief, Law Enforcement Div., U.S. Coast Guard to G. Etzel Pearcy, Geographer, U.S. Dep't of State at 1 (Jun. 22, 1967) (Exhibit AK-104). Another letter, similarly, said: "the lines on these charts had no official status but rather were used exclusively to facilitate the task of the on-scene enforcement officials in ascertaining whether there was a reasonable basis for undertaking enforcement action." Letter from Vice Admiral T.R. Sargent, Acting Commandant, U.S. Coast Guard to Senator Ted Stevens at 2 (May 31, 1972) (Exhibit AK-117). The letters do not identify any specific enforcement actions or elaborate on how they served as a "guide." The Special Master considers below whether these letters, when combined with other evidence, suffice to demonstrate the legal requirements for historic waters. *See infra* part II.D.1.b.

d. Coastline Committee and Disclaimer

In 1970, the acting Legal Adviser of the Department of State formed an "Ad Hoc Committee on the Delimitation of the United States Coastline," commonly called the "Coastline

Committee."[33] *See Rhode Island and New York Boundary Case*, 469 U.S. at 522 n.15. The Coastline Committee had responsibility for determining the location and limits of the United States coast line and territorial sea. In 1971, the Coastline Committee published 155 charts covering all coastal states. *See* Ad Hoc Committee on the Delimitation of the United States Coastline, *Summary Report* 1 (1971) (Exhibit AK-115). These charts were distributed to foreign nations.

In preparing the charts, the Coastline Committee generally used the envelope of arcs of circles method to draw the territorial sea at a distance of three miles from the mainland. *See* Memorandum form Carl F. Salans, Acting Legal Adviser, U.S. Dep't of State to LOS Task Force Executive Group at tab B (Aug. 7, 1970) (Exhibit AK-116 at HW 01968). The Committee marked historic and juridical bays in some areas, but did not designate the waters of the Alexander Archipelago as historic inland waters. Instead, the charts depicted waters overlying the pockets and enclaves of submerged lands as high seas because they lie more than three miles from any shore. The United States continues to use these charts to this date.

Both the United States and Alaska view the publication of these charts as an official statement that the Alexander Archipelago does not contain historic inland waters. *See* Alaska Count I Memorandum at 42; U.S. Count I Memorandum at 38.

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[33]The committee members included Mr. Michael Reed, who now serves as an attorney for the United States in this case. Alaska has not asserted that accepting the Coastline Committee's written work as evidence in this case in any way would disqualify Mr. Reed.

As explained further below, however, they disagree about the legal consequence of this statement. *See infra* part II.D.1.a.

e. Legal Adviser's Memorandum

Congress held hearings on the Coastline Committee's charts in 1972. These hearings produced testimony and other evidence regarding the status of the waters of the Alexander Archipelago. Some of this evidence has been discussed above. *See supra* part II.C.4.b.(2). Alaskan officials generally did not approve of the way the charts treated the Alexander Archipelago. In a memorandum written in connection with the hearings, State Department Legal Adviser John R. Stevenson summarized the Alaskan sentiments:

> The charts use the arcs-of-circles method to depict the territorial sea and contiguous zone in the Alexander Archipelago, a group of large islands separated from each other and the mainland by narrow straits. Alaskans have reacted strongly to this approach, which they believe is inconsistent with what they consider the traditional treatment of the waters of the Archipelago as internal waters, and have urged that the federal government either use straight baselines to enclose the area as internal waters or assert an historic claim to that effect.

Memorandum from John R. Stevenson, Legal Adviser, U.S. Dep't of State to Ambassador McKernan *et al.*, *Baselines for the Alexander Archipelago: Background for September 1 Meeting* 1 (Aug. 30, 1972) (Exhibit AK-118).

The memorandum addressed various considerations. With respect to historic inland water status, it suggested that the

United States does not permit innocent passage through the waters of the Alexander Archipelago. The memorandum states:

> We understand informally from Coast Guard officers familiar with practice in Alaska that no right of innocent passage has generally been accorded in the Alexander Archipelago. Moreover, vessels entering the waters of the Archipelago *en route* to U.S. ports apparently have been required to give notice before entering those waters. There is apparently an exception in the "Ins[i]de Passage" along the Alaskan and Canadian coasts, where U.S. and Canadian vessels (only) transit freely.

Id. at 8. The parties agree that this memorandum describes a claimed right of exclusion. A subsequent memorandum for the State Department's Legal Adviser saw a "substantial question" whether sufficient evidence existed to justify a historic waters claim. *See* Memorandum from Charles N. Brower, U.S. Dep't of State to Ambassador McKernan *et al.*, *Baselines for the Alexander Archipelago* 1 (Jan. 16, 1973) [Exhibit AK-124]. The Special Master considers below whether these memoranda, when combined with other evidence, suffice to demonstrate Alaska's entitlement to summary judgment. *See infra* part II.D.1.b.

f. Transit by Foreign Vessels

The United States has presented information showing that foreign vessels have consistently made innocent passage through the waters of the Alexander Archipelago. *See* U.S. Count I Memorandum at 43-44. It relies on several sources, including a preliminary report by its expert, Professor Barry M. Gough. The United States emphasizes that this report shows

that vessels from nine nations have made free passage through the waters of the Alexander Archipelago since 1775.

(1) *Explorers, Fur-Traders and Whalers.* Gough's report identifies by name numerous vessels from Spain, Britain, France, and the United States that navigated the waters of the Alexander Archipelago from 1775 until 1867. *See* Gough, *supra*, at 5-33. These vessels engaged in exploration, fur-trading, and whaling. Looking at all the evidence, Gough concludes: "Such use caused Russian authorities concern, and these authorities or their representatives sometimes took measures to check such traffic or passage but found that such regulations as they enforced were suspended or nullified by their superiors." *Id.* at 41.

Alaska emphasizes that Gough's report identifies only British and American vessels during the period between 1834 and the 1867 Treaty of Cession. It notes that many of these vessels only visited Sitka, which lies on the outside of the Archipelago. In addition, Alaska points out that the presence of British vessels shows little because the Russian American Company leased its mainland possessions in Southeast Alaska to Britain's Hudson Bay Company in 1839. *See* Alaska Count I Opposition at 37-38.

(2) *Prospectors.* The Klondike is a region of Canada's Yukon Territory that lies north of Southeast Alaska. The discovery of gold in a tributary of the Klondike River caused a famous gold rush in 1897 and 1898. Some prospectors traveled through the waters of the Alexander Archipelago to reach Skagway, which lies at the north end of Lynn Canal. They then proceeded inland to the Klondike region. Gough's report identifies by name Canadian vessels that used this route. *See*

Gough, *supra*, at 38. Other prospectors took a different course. A map from the Klondike gold rush era shows that Canadian ships sailed from Vancouver, entered the waters of the Alexander Archipelago in the south, exited those waters at Sitka or Cross Sound, and then continued across the Gulf of Alaska and around the Alaska Peninsula to St. Michael's at the mouth of the Yukon River. *See Historical Atlas of the Pacific Northwest* 186 (Exhibit US-II-31 at 9). Canadian vessels transported minerals through the waters of the Alexander Archipelago to Canadian ports until at least the second half of the 20th century. *See* Gough, *supra*, at 39-40. Alaska stresses that Gough identifies only vessels from Britain and Canada and not from other nations. *See* Alaska Count I Opposition at 38-39 & n.12.

(3) *Tourists*. At end of the 1930s and start of 1940s, tourists sailed in Canadian vessels through the waters of the Alexander Archipelago to view Glacier Bay. In 1939, the Canadian Pacific Company and the Canadian National Railways operated steamship lines with regular routes to Alaska. *See* Earl A. Trager, Glacier Bay Expedition 6 (1939) (Exhibit US-I-21). In 1941, the Superintendent of the Glacier Bay National Monument reported that Canadian lines sailed past Glacier Bay. *See* Memorandum from Frank Been, Superintendent, Glacier Bay National Monument to Regional Director, National Park Service at 5 (1941) (Exhibit US-I-22 at US0000126); *see also* Exhibits US-I-23 *through* US-I-26 (memoranda and other documents from the National Park Service from 1946-1950 documenting other foreign vessels in the waters of the Glacier Bay National Monument). Gough's report also identifies cruise ships from other foreign countries. *See* Gough, *supra*, at 41. Alaska stresses that the first non-British or Canadian foreign

cruise ship identified by Gough did not make journeys into the Alexander Archipelago until 1973. *See* Alaska Count I Opposition at 39.

D. Assessment of the Documents as a Whole

With this understanding of the documents submitted, the question arises whether taken as a whole they establish either party's entitlement to summary judgment on Alaska's claim. The parties agree that Alaska has the burden of proving that the waters of the Alexander Archipelago meet the requirements for historic waters identified in part II.A. above. To reiterate, the Court has said:

> [W]here a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations.

Alaska (Arctic Coast), 521 U.S. at 11 (citation omitted). The Court also has considered the "vital interests of the United States" in designating waters as historic inland waters. *Alabama and Mississippi Boundary Case*, 470 U.S. at 103.

The parties disagree about the necessary quantum of proof. Alaska asserts that "no special burden of proof applies here," apparently meaning that it must demonstrate its historic waters claim only by a preponderance of the evidence. Alaska Count I Opposition at 7. The United States, in contrast, says that historic waters claims always require special proof. *See* U.S. Count I Reply at 4-5. When they involve a federal disclaimer,

the United States says, historic waters claims require proof clear beyond doubt. *See id.*

The Court has not identified the exact quantum of proof required to sustain a historic waters claim. In *Alaska*, the Court described the elements of a historic waters claim as "strict evidentiary requirements." 521 U.S. at 11. This phrase appears to mean that a plaintiff must prove each requirement without any exceptions; it does not reveal any need to prove the requirements by extraordinary evidence. Other sources, however, have said that historic waters claims require special proof. *See, e.g.*, Gayl S. Westerman, *The Juridical Bay* 180 (1987) (saying that historic waters claims require "extraordinary proof"); Secretariat, U.N. General Assembly, *Juridical Regime Of Historic Water, Including Historic Bays* 7, ¶ 40, A/CN.4/143 (Mar. 9, 1962) [hereinafter *Juridical Regime*] (Exhibit US-I-4) (saying that the proof must be "rigorous" and the basis of title must be "exceptionally strong").

In *California*, the United States issued a disclaimer denying that the waters at issue constituted historic bays. *See* 381 U.S. at 175. The Court therefore had to determine the effect of the disclaimer. The Court said:

> We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

Id. This statement makes clear that evidence beyond doubt can overcome a disclaimer, but that questionable evidence cannot. The statement, however, does not reveal whether any cases

might involve proof somewhere in between "questionable evidence" and evidence "clear beyond doubt," and whether such proof would defeat a disclaimer. In this case, however, the Court need not address the issue. As shown below, Alaska cannot prove its claim by even a mere preponderance of the evidence.

1. Exercise of Sovereign Authority

To demonstrate its claim, Alaska first must show that Russia and the United States historically exercised authority over the waters of the Alexander Archipelago. *See Alaska (Arctic Coast)*, 521 U.S. at 11. "For this showing," the Court has elaborated, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." *Alaska (Cook Inlet)*, 422 U.S. at 197. This assertion of power is required because a nation may exclude vessels from its internal waters, but must allow them to make innocent passage in its territorial sea. In this case, the facts show that Russia and the United States historically did not assert authority to exclude vessels from making innocent passage through the waters of the Alexander Archipelago. This conclusion becomes apparent by separating and analyzing the documents best supporting the positions of each party and then assessing the remaining documents.

a. Documents Best Supporting the United States

Several of the documents described above unambiguously support the United States' position that the United States and Russia historically did not assert the right to exclude foreign vessels from the waters of the Archipelago. First, Secretary of

State Thomas F. Bayard's letter to Secretary of the Treasury Daniel Manning in 1886 shows that the State Department did not see the waters of Southeast Alaska as inland waters. *See supra* part II.C.2.c.(4). This letter deserves substantially more weight than the other letters described from the same era. Not only did Secretary of State Bayard have more authority than lower level government officials, but his letter also specifically concerned the legal status of the Alexander Archipelago's waters. The letter, as noted above, said that the United States could not "claim greater jurisdiction" than three miles of marginal seas and that foreign vessels had the right to make "free transit." Officials who held this belief could not, and evidently did not, claim that the United States could exclude innocent passage through the waters.

Second, the letters between the Secretary of Commerce and Secretary of State in 1934 demonstrate that the Secretaries did not consider the waters of the Alexander Archipelago to be inland waters. Like Secretary of State Bayard's 1886 letter, these letters are directed specifically to the point at issue. They show that, when enforcement actions would turn on the legal status of the waters, the United States took the position that the waters were not inland waters, even though that was unfavorable to the United States' own interests. Again, officials who held these views could not, and did not, assert that the United States had a right to exclude foreign vessels.

Alaska argues that "internal, confidential correspondence" between government officials cannot constitute a disavowal of authority over the waters of the Archipelago. Alaska Count I Reply at 22. These letters, however, show more than a mere private understanding between two government agencies; they

indicate that their understanding guided enforcement. True, the Secretary of Commerce asked that the understanding not be publicly announced, so as not to encourage foreign vessels to explore the possibility of fishing in the pockets and enclaves, *see* Letter from Daniel C. Roper, Secretary, U.S. Dep't of Commerce to Secretary, U.S. Dep't of State at 2 (Sept. 5, 1934) (Exhibit US-1-14), but the agreement not to prevent Canadians from fishing outside the three-mile limit nonetheless indicates that the United States' actual, subsequent actions, which other nations could observe, would be consistent with the view that the pockets and enclaves were not inland waters. Combined with the 1886 letter, they show the State Department, at least, could not have "continuously" claimed that the waters of the Archipelago were inland waters.

Third, the United States has asserted without contradiction that no published list of the world's historic waters includes the waters of the Alexander Archipelago. *See supra* part II.C.4.h.2. The absence of any publication identifying the waters as historic waters gives credence to the view that the United States never made a sufficient assertion of authority to exclude foreign vessels from making innocent passage.

Alaska correctly asserts that inclusion in a list is not a requirement under the Court's precedents. *See* Alaska Count I Opposition at 45. It notes that Mississippi Sound did not appear on the United Nation's study of historic waters cited by the United States, but the Court nonetheless ruled that Mississippi Sound constitutes historic inland waters. *See id.* Yet, even if publication is not required, the absence of publication has significance in international disagreements about historic waters claims. For example, during the 1980s, in protesting historic

bay claims by Australia, the United States pointed out that none of the claimed bays was listed in the 1957 United Nations study. *See* J. Ashley Roach & Robert W. Smith, *United States Responses to Excessive Maritime Claims* 35-37 (2d ed. 1996) (Exhibit US-I-27); Clive R. Symmons, *Preliminary Expert Witness Report* 133 (Jan. 26, 2002) (Exhibit US-I-1). In addition, the Alexander Archipelago would be much harder to overlook than the Mississippi Sound; it covers eighteen times the area and has far more international traffic.

Fourth, and most significantly, publication of the Coastline Committee's 1971 charts indicated to the world that the United States was not claiming a right to exclude foreign vessels from the waters of the Alexander Archipelago. Alaska considers these charts irrelevant because, in its view, title to submerged lands in Alaska ripened in 1959 when Alaska became a state. *See* Alaska Count I Opposition at 40-41.

The Court has addressed the power of the United States to disclaim inland water status in three cases. In *California*, as noted above, the United States denied that any of the inlets at issue were historic waters. The Court held that the disclaimer was "decisive" given the "questionable evidence of continuous and exclusive assertions of dominion over the disputed waters." 381 U.S. at 175.

In the two other cases, the Court did not give decisive effect to a federal disclaimer. In the *Louisiana Boundary Case*, the Court said that it would not permit the United States to distort international law principles concerning historic inland waters "by denying any effect to past events." 394 U.S. at 77 (footnote omitted). The Court explained:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines [under article 4 of the Convention]. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California*.

Id. at 77 n.104.

Most recently, in the *Alabama and Mississippi Boundary Case*, the United States asserted that it had disclaimed the characterization of Mississippi Sound as historic waters by publishing the Coastline Committee's 1971 charts of the area. *See* 470 U.S. at 111-12. The Court disagreed. It said:

> We conclude that historic title to Mississippi Sound as inland waters had ripened prior to the United States' ratification of the Convention in 1961 and prior to its disclaimer of the inland-water status of the Sound in 1971. That disclaimer, issued while the Court retained jurisdiction to resolve disputes concerning the location of the coast line of the Gulf Coast States, is insufficient to divest the States of their entitlement to the submerged lands under Mississippi Sound.

Id. at 112.

This case resembles *California* more closely than it does the *Louisiana Boundary Case* or the *Alabama and Mississippi Boundary Case*. Here, as in *California*, the claim of historic waters rests upon "questionable evidence of continuous and

exclusive assertions of dominion over the disputed waters." 381 U.S. at 175. As explained immediately below, Alaska's best evidence does little to support its view that the United States continuously asserted that it had the power to exclude foreign vessels. The United States does not seek to deny the "effect of past events"—the concern of the Court in the *Louisiana Boundary Case*—but merely to argue that those events do not establish historic title. Finally, the United States did not issue the disclaimer during the course of ongoing litigation with Alaska; on the contrary, the 1971 charts disclaiming the inland water status of the Alexander Archipelago predate this litigation by nearly 30 years. For these reasons, the disclaimer is relevant, and it strongly supports the United States.

In addition to these strongly supportive documents, the Special Master believes that the 1825 treaty between Russia and Britain and the 1871 treaty between the United States and Russia also strongly support the United States' view. These treaties, as explained above, granted Britain a perpetual right to navigate the Stikine River. *See supra* parts II.C.1.b & II.C.2.a. As described above, affording Britain this right would have served no purpose unless the parties understood that Britain had the right to traverse the waters of the Alexander Archipelago to reach the mouth of the Stikine River. Only Professor Dall's letter to Secretary of State Bayard opposes this inference. *See supra* part II.C.2.c.(5). As explained immediately below, Dall's views on the legal interpretation of a treaty do not deserve great weight.

b. Documents Best Supporting Alaska

Various documents show some recognition of the waters of the Alexander Archipelago as inland waters. These documents, however, do not establish a sufficient assertion of power to exclude vessels from the waters of the Alexander Archipelago to establish Alaska's claim by the preponderance of the evidence.

First, Professor Dall's letter to Secretary of State Bayard unambiguously shows that Dall and a Canadian official believed that the United States could exclude foreign vessels from some navigation routes through the waters of the Alexander Archipelago. *See supra* part II.C.2.c.(5). The United States, however, argues that this informal discussion by two non-lawyers, hired for their scientific expertise, does not suffice to establish historic inland waters. *See* U.S. Count I Opposition at 13. Alaska responds that the Court cited similar statements in government documents in the *Alabama and Mississippi Boundary* case. *See* Alaska Count I Reply at 18 (citing 420 U.S. at 102-106).

The Special Master agrees with the United States. In the *Alabama and Mississippi Boundary Case*, the Court cited various government reports in concluding that Mississippi Sound includes historic inland waters. *See* 470 U.S. at 102-106. The Court, however, primarily relied on those documents in considering the vital interests of the United States. *See id.* That is a separate requirement, independent of the question of whether the United States asserted authority to exclude foreign vessels.

In *California*, the State argued that its state constitution declared, and a few state court decisions had held, that Califor-

nia had jurisdiction over indentations that it claimed as historic waters. *See* 381 U.S. at 172-173. The Court, however, ruled that this evidence did not suffice to establish a historic waters claim. The Court explained that "a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim." *Id.* at 174 (footnote omitted). If state legislative declarations do not suffice, then informal discussions between scientists also should not.

Second, at the 1903 Alaska Boundary Tribunal, counsel for the United States described the political coast line of Southeast Alaska as a set of lines connecting the outer islands of the Alexander Archipelago. *See supra* part II.C.3. As explained above, the Special Master does not believe that the counsel was speaking merely hypothetically for the purpose of showing the absurdity of a British argument. *See id.* A separate question, though, is whether the statements are a legally sufficient assertion of authority to establish a historic waters claim.

The United States contends that government arguments in arbitral or judicial proceedings as a matter of law do not suffice to establish an assertion of sovereign authority. *See* U.S. Count I Memorandum at 22-24; U.S. Count I Reply at 9-10. It asserts that foreign nations realistically cannot review and evaluate all arbitral proceedings that might contain statements regarding inland water claims. *See* U.S. Count I Memorandum at 23. This position finds some support in *Alaska (Cook Inlet)*, where the Court stressed that the "adequacy of a claim to historic title" is measured internationally. 422 U.S. at 203. Assertions of sovereign authority over waters must give foreign nations realistically accessible notice.

As Alaska correctly asserts, however, a strict rule prohibiting consideration of government arguments in arbitral or judicial proceedings would conflict with the *Alabama and Mississippi Boundary Case*. *See* Alaska Count I Opposition at 17. In that decision, the Court determined that it previously had treated Mississippi Sound as inland waters in a 1906 precedent. *See* 470 U.S. at 107-109 (citing *Louisiana v. Mississippi (Louisiana and Mississippi Boundary Case)*, 202 U.S. 1 (1906)). When the United States disputed the Court's interpretation of the 1906 precedent, the Court noted that the United States had interpreted the case in the same way in a brief that it had filed in 1958. The Court said:

> If foreign nations retained any doubt after *Louisiana v. Mississippi* that the official policy of the United States was to recognize Mississippi Sound as inland waters, that doubt must have been eliminated by the unequivocal declaration of the inland-water status of Mississippi Sound [in a brief filed] by the United States in an earlier phase of this very litigation.

Id. at 108-109 (footnote omitted). The Court thus not only relied on assertions by counsel in a legal brief, but also indicated that foreign nations should have taken notice of the brief.

Even if arguments in arbitral and judicial proceedings can help to establish historic water claims, their context must determine how much weight they have. In the *Alabama and Mississippi Boundary* case, although the Court cited the United States' brief, the Court did not suggest that the brief by itself would have sufficed to make Mississippi Sound a historic bay. On the contrary, the Court relied on its own precedent and said that the brief confirmed the claim. *See id.* Foreign nations can

be expected to know that the United States Supreme Court has the final authority to decide domestic boundary disputes. The Court's decisions, moreover, are readily accessible.

In this case, by contrast, the arguments of counsel before the 1903 Alaska Boundary Tribunal are not an adequate assertion of authority over the waters of the Alexander Archipelago. The status of the waters of the Alexander Archipelago was not at issue before the Tribunal. The Tribunal did not discuss the arguments of counsel or rule on their validity. The arguments take up only a few paragraphs in a seven volume record. For these reasons, it would be unrealistic to conclude that counsel's assertions at the tribunal should have made foreign nations (other than Britain) aware that the United States was asserting a right to exclude them.[34] By way of comparison, the United States properly asserts that it would be unrealistic to conclude that the United States would have notice of historic waters

[34]At least one other nation subsequently learned what the United States argued at the 1903 Tribunal. Counsel for Norway found and cited the position of the United States in the *Fisheries Case*. *See* Alaska Report, *supra*, at 95 (describing Norway's argument in Counter-Memorial of Norway (U.K. v. Nor.), 1951 I.C.J. Pleadings (1 Fisheries Case) 477 (para. 446) (July 31, 1950)). The ability of one foreign nation to discover the United States' argument when litigating a related issue, however, does not mean that foreign nations should have known of the United States' position. The Court's decision in *California* indicates that whether a source gives foreign nations reason to know that the United States is claiming inland water status depends on the prominence and authoritativeness of the source. *See* 381 U.S. at 174.

claims based on similar arguments that Libya might make in an arbitration with Tunisia or North Korea might make in an arbitration with China. *See* U.S. Count I Memorandum at 23.

Third, Alaska has shown that federal fishery regulations have covered the waters of the Alexander Archipelago, including pockets and enclaves more than three miles from any shore. *See supra* part II.C.4.b. Alaska argues that if the United States asserted the right to enforce fishing regulations against foreign vessels in locations more than three miles from shore, those locations must been recognized as inland waters. *See* Alaska Count I Memorandum at 16. The State apparently reasons that the waters more than three miles from shore must have been considered either inland waters or territorial sea located within three miles of inland waters because the United States may not enforce fishing regulations against foreigners on the high seas. *See id.* (asserting that fishing regulations were enforced against foreign nationals beyond three nautical miles from shore and the "reason was that the waters of the Archipelago—regardless of their distance from the physical coast—were recognized as inland waters").

Alaska's argument has a very weak factual predicate. The laws and regulations cited by Alaska have broad enough language that they might have reached foreign vessels within all the waters of the Alexander Archipelago. As described above, however, Alaska presents no definite examples of actual enforcement of fishing regulations against foreign nationals within the pockets and enclaves. The location of the *Marguerite* incident remains unsettled. *See supra* part II.C.4.b.(1). Although the 1972 Congressional hearings contain general statements to the effect that the United States did enforce its

fishing regulations against foreign vessels, these statements do not identify any specific enforcement actions occurring more than three miles from shore. *See supra* part II.C.4.b.(2). In 1934, moreover, the Department of Commerce took the position that Canadian fishermen had a right to fish within the Archipelago so long as they remained more than three miles from shore. *See supra* part II.C.4.b.(3).

In any event, the factual question of whether the United States enforced its fishing regulations more than three miles from shore is, ultimately, immaterial. Historic inland water status must arise from "an assertion of power to exclude all foreign vessels and navigation." *Alaska (Cook Inlet)*, 422 U.S. at 197. The fishing regulations cited by Alaska controlled fishing, but did not purport to exclude all foreign vessels. Therefore, enforcement of fishing regulations in the pockets and enclaves, even if it actually occurred, would not directly show that the United States asserted that these waters were inland waters.

The Court has rejected the idea that the United States can regulate fishing only to the limit of its territorial sea. In *Alaska (Cook Inlet)*, the Court recognized that the "assertion of national jurisdiction over coastal waters for purposes of fisheries management frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters." *Id.* at 198-99. The Court cited a presidential Proclamation from 1945 asserting power to establish fishing conservation zones within the high seas. *See id.* (citing Proclamation No. 2668, 59 Stat. 885 (Sept. 28, 1945)). Therefore, even if Alaska could prove the factual premise of its argument—that the United States enforced fishing regulations in the pockets and enclaves at

issue—this proof would not lead to the conclusion that the United States regarded the waters of the Archipelago as inland waters or territorial sea.

Alaska seeks to distinguish *Alaska (Cook Inlet)*. It says that the Court in that case found that federal fisheries regulations did not establish inland water status "because there was no evidence that foreign vessels were treated differently from United States vessels." Alaska Count I Reply at 24. Alaska says that the present case differs because federal regulations prohibited foreign vessels from fishing in places where the regulations permitted United States vessels to fish. *See id.* The State again cites the Alien Fishing Act as an example.

Alaska's argument appears to rest on a brief passage in the *Alaska (Cook Inlet)* case, in which the Court said:

> Only one of the fishing regulations relied upon by the court, the Alien Fishing Act, treated foreign vessels any differently than it did American vessels. That Act, however, did not purport to apply beyond the three-mile limit in Cook Inlet.

422 U.S. at 197-198. In this passage, though, the Court was not suggesting that fishing regulations establish inland water status if they treat foreign vessels differently from United States vessels. On the contrary, the Court simply recognized that the Alien Fishing Act was the only law cited in the case that clearly applied to foreign vessels.

In the next paragraph, the Court said that its conclusion that enforcement of game and fish regulations could not establish historic inland water status was "not based on mere technicality." *Id.* at 198. The Court reiterated the point that nations frequently assert jurisdiction to enforce fishing regulations even

beyond their territorial waters. *Id.* at 198-99. This point did not appear to be limited to enforcement of fishing regulations against a nation's citizens. Accordingly, the Court would not recognize a nation's enforcement of fishing regulations in particular waters, even against foreigners, as sufficient proof that the nation regarded the waters as inland waters or even territorial sea.

Fourth, in *Organized Village of Kake v. Egan*, the trial court and the Supreme Court of Alaska concluded, that the waters of the Alexander Archipelago are historic inland waters. *See* 174 F. Supp. at 504 (trial court); 362 P.2d at 926-27 (Alaska Supreme Court). These court decisions, however, are not themselves part of the evidence supporting Alaska's historic inland waters claim. Alaska asserts that its claim matured prior to statehood, and these decisions came after that time. The decisions are relevant, at most, for the persuasive value of their examinations of the historical record.

The Court previously has determined that state supreme court decisions regarding historic inland waters claims are not controlling in original jurisdiction cases. In *California*, as previously noted, the Court rejected California's claim that Santa Monica Bay was a historic bay. *See* 381 U.S. at 173. The Court reached this conclusion even though the California Supreme Court had squarely decided in *People v. Stralla*, 96 P.2d 941 (Cal. 1939), that Santa Monica Bay was a historic bay.[35] *See California*, 381 U.S. at 174-75. *California* makes

[35]The *Stralla* case concerned a criminal prosecution of defendants accused of operating a gambling ship in the waters of Santa Monica bay, but more than three miles from any shore. The court stated that the appeal presented "the single question whether the territorial jurisdiction of the state of California extends over the area of the waters known as Santa Monica bay." 96 P.2d at 942.

clear that the Court may conduct its own analysis of the history of the Alexander Archipelago.

The Supreme Court of Alaska gave much briefer consideration to the historic inland water issue in *Kake* than the California Supreme Court gave to the issue in *Stralla*, possibly because *Kake* dealt mostly with other issues, while *Stralla* turned solely on the question of California's jurisdiction over the waters of the alleged bay. The Supreme Court of Alaska's historical analysis consists of a single paragraph that paraphrases sentences from the trial court's factual finding, *see* 362 P.2d at 926-27; in contrast, the California Supreme Court's discussion of the status of the waters of Santa Monica Bay extends many pages, *see* 96 P.2d at 941-949. In addition, the Supreme Court of Alaska, like the California Supreme Court, made its decision before the United States had issued a disclaimer, and therefore it could not take the disclaimer into account. Accordingly, the Special Master concludes that the Supreme Court of Alaska's decision in *Kake*, like the California Supreme Court's decision in *Stralla*, is not persuasive. Determination of whether the waters of the Alexander Archipelago are historic inland waters must turn on an independent assessment of the historic documents presented in this case.

Fifth, in a brief filed in *United States v. California*, the United States said that straits in the Alexander Archipelago would be treated as bays under standards that the United States expected from other nations. *See supra* part II.C.5.b. Accord-

ing to Alaska, the brief shows that the United States continued to take the position that the waters of the Alexander Archipelago are inland waters after Alaska's statehood. *See* Alaska Count I Memorandum at 37-38. The United States says that the brief has no significance, asserting that it merely made an "inconsequential misstatement about a dubious delimitation principle that the U.S. suggested in 1930, never actually applied to the Archipelago, and abandoned upon signing the Convention." U.S. Count I Reply at 11-12.

The Special Master agrees with the United States that the *California* brief has little relevance. The brief was mistaken because, as explained above, it assumed that all of the straits in the Alexander Archipelago led only to inland waters when they in fact do not. The reference to the Alexander Archipelago played no role in *California* decision. The United States, moreover, was identifying standards that it would use for deciding whether to acquiesce in foreign inland waters claims; it was not using the standard to make its own claim.[36]

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[36]The Special Master also notes that, in *California*, the Court rejected California's claim that Santa Monica Bay was a historic bay even though, in the 1939 case of *People v. Stralla*, 96 P.2d 941, the United States Attorney had participated as *amicus curiae* supporting the position of the State. *See California*, 381 U.S. at 173 n.49. The Court said that it did "not consider this action so significant as to foreclose the United States in the controversy before us." *Id.* If the United States' express support for the position that certain waters are inland waters, in a case squarely presenting that issue, can later be disregarded, then the Court similarly should disregard a misstatement by the United States in a case not concerning the waters about which

Sixth, the State Department Legal Adviser wrote a memorandum in 1972 saying that the State Department understood from Coast Guard officers that no right of innocent passage has generally been accorded in the Alexander Archipelago. *See supra* part II.C.5.e. Alaska says that this statement shows that federal officials continued to show doubt about the correctness of the 1971 disclaimer. *See* Alaska Count I Memorandum at 42, 44.

This memorandum appeared after the 1971 disclaimer and therefore it could not establish a new historic waters claim. To the extent that Alaska is citing the memorandum for evidence of the United States' practice before 1971, the document has little, if any, value. The memorandum relies on informal statements made by unknown Coast Guard officers. The memorandum supports its statement that foreign vessels have no right of innocent passage by observing that foreign vessels must give prior notice before entering the waters. The United States, however, correctly notes that under the Convention foreign ships exercising the right of innocent passage may have to comply with notice requirements. *See* Convention, *supra*, art. 17 ("Foreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State . . . ."). Accordingly, a requirement that vessels entering waters of the Archipelago en route to United States ports must give notice before entering those waters does not mean that the United States is denying them innocent passage under the Convention.

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the misstatement was made.

c. All Other Documents

The other documents presented in the case do not support a historic waters claim. The Imperial Ukase of 1821 sought to exclude vessels from all waters within 100 Italian miles of the coast. *See supra* part II.C.1.a. The Court previously has held that the ukase did not establish historic inland water status because Russia withdrew the ukase after immediate protests by the United States and Britain. *See Alaska (Cook Inlet)*, 422 U.S. 191-192. Alaska has acknowledged that it cannot rely on the ukase. *See* Alaska Count I Opposition at 8.

Treaties made in 1824 and 1825 gave the United States and Britain rights to enter Russian marine territorial waters for ten years for the purposes of trade and fishing. For the reasons stated above, granting this right did not imply that Russia was claiming the power to deny innocent passage. *See supra* part II.C.1.b. The submissions concerning the *Loriot*, the *Dryad*, and the *Chichagoff* vessels likewise fail to show that Russia denied innocent passage throughout the waters of the Archipelago. *See supra* part II.C.1.c-e. Similarly, the State Department's notice to mariners published in 1845 does not show that the United States acknowledged that Russia had the right to exclude vessels from the waters of the Alexander Archipelago. The notice told Americans not to frequent the "interior seas, gulfs, harbors, and creeks upon" the northwest coast. The document does not show that all of the waters of the Alexander Archipelago are interior seas, gulfs, harbors, and creeks. *See supra* part II.C.1.f.

The various documents covering the period from 1867 to 1902 also do not establish that the United States exercised authority over the waters of the Alexander Archipelago as

inland waters. As described above, most of the documents from this era have little bearing on the case one way or another. While Alaska has shown that various government officials used phrases like "inland waters," they generally used the words in a non-legal sense and in a manner that did not cover all of the waters of the Alexandria Archipelago. *See supra* part II.C.2.c.

The records of the 1910 North Atlantic Fisheries Arbitration do not resolve the status of the waters of the Alexander Archipelago. *See supra* part II.C.4.a. The two proposals made by the United States at the 1930 League of Nations Conference in the Hague also do not show that the United States was claiming the waters of the Alexander Archipelago as inland waters. One proposal was that straits leading to inland waters would be treated as inland waters if their closing lines are less than ten miles wide. This proposal is inapplicable to much of the area in dispute because some of the straits in the Alexander Archipelago lead from areas of high seas to other areas of high seas. The proposal to assimilate pockets of high seas to the territorial sea does not support Alaska's position that the pockets and enclaves at issue in this case are inland waters.

The A-B line negotiations with Canada do not prove an inland waters claim. As explained above, the United States and Canada never formally agreed to any convention. Moreover, none of the documents presented by Alaska shows that the State Department or Canada viewed all of the waters of Alexander Archipelago as inland waters. *See supra* part II.C.4.d. The two nations furthermore did not make public assertions of a right to exclude. *See supra* part II.C.4.c. The various statements emanating from the State Department to the Coast Guard, to the Department of Interior, and to Norway also do not establish that

the United States asserted the power to exclude foreign vessels from the waters of the Alexander Archipelago. *See supra* part II.C.4.e. The same is true of the hearings on statehood legislation and the United States' general policies on coastal islands. *See supra* part II.C.4.f-g.

The Pearcy Charts do not support Alaska's claim. As noted above, the United States did not adopt the Pearcy charts. The letters written by United States officials do not identify any specific enforcement actions taken in reliance on these charts. Given this lack of specificity, they do not establish that the United States was claiming all of the waters behind the lines drawn on the charts as inland waters. *See supra* part II.C.5.c.

Gough's report and other documents show that foreign vessels have freely navigated the waters of the Alexander Archipelago for over 200 years. *See supra* part II.C.5.f. The United States considers the lack of exclusion of any foreign vessels significant. It contrasts this case to the *Alabama and Mississippi Boundary* case, which involved an out-of-the-way body of water avoided by foreign ships. *See* U.S. Count I Reply at 16. Alaska, however, correctly argues that the United States does not actually have to exclude foreign vessels from waters for those waters to constitute historic inland waters; instead, the United States merely has to assert the right to exclude them. *See* Alaska Count I Opposition at 34-35. In addition, the State properly contends that uninhibited usage of the waters proves very little because the United States never had reason to exclude foreign vessels that were coming to Alaska for the benefit of the area. *See id.* at 38-40.

d. Conclusion

The history of the Alexander Archipelago is long and involves many details. Consideration of the whole record, however, demonstrates that Alaska, at best, has uncovered and presented only "questionable evidence" that the United States exercised the kind of authority over the waters of the Archipelago that would be necessary to prove a historic waters claim. Such questionable evidence cannot, in accordance with *California*, overcome the United States' 1971 disclaimer. Even if the disclaimer were not at issue, and the question were simply whether Alaska could prove such exercise of authority by a preponderance of the evidence, the record demonstrates that Alaska could not do so. Upon the whole record, the Special Master concludes that Alaska cannot prove this essential element of its historic inland waters claim. This conclusion constitutes a sufficient basis for recommending that the Court award summary judgment to the United States on count I of the complaint.

2. Continuity of Exercise of Authority

The Court has said that, to establish historic title, a nation not only must have asserted authority, but also must have "done so continuously." *Alaska (Arctic Coast)*, 521 U.S. at 11. The foregoing analysis has concluded that the United States and Russia did not sufficiently assert authority over the waters of Alexander Archipelago. Accordingly, the United States and Russia could not have done so continuously. Yet, even if the Court disagrees, and concludes that Russia or the United States did assert authority to exclude foreign vessels, the requirement of long-term continuity would prevent the waters of the

Alexander Archipelago from having the status of historic inland waters.

The Convention does not specify how long a coastal nation must exercise authority over waters before they become historic inland waters. The Court also has not identified a definite number of years. Prior original jurisdiction cases, however, provide some guidance.

Three cases suggest that a period of more than 100 years would suffice. In the *Alabama and Mississippi Boundary* case, the Court held that a continuous assertion of authority for 168 years made Mississippi Sound a historic bay. *See* 470 U.S. at 102. Special Master Walter E. Hoffman similarly concluded that 192 years was long enough for Vineyard Sound to become a historic bay. *See* Report of the Special Master at 63, *United States v. Maine (Massachusetts Boundary Case)* (Oct. Term 1984) (No. 35, Orig.) [hereinafter Massachusetts Report]. Special Master Albert B. Maris said that 105 years would have sufficed for Florida Bay if other requirements had been met. *See* Florida Report, *supra*, at 42.

Two other cases have said that certain shorter periods do not suffice. Special Master Hoffman concluded that 53 years was too brief a period for Nantucket Sound. *See* Massachusetts Report, *supra*, at 69.3. Special Master Maris also ruled that oil leases made nine years before enactment of the Submerged Lands Act of 1953 were not remote enough in time to make Florida Bay a historic bay. *See* Florida Report, *supra*, at 46.

In this case, Alaska contends that the waters of the Alexander Archipelago had satisfied the requirements for historic inland waters at the time of statehood in 1959. *See* Alaska Count I Memorandum at 2. A later date presumably would not

allow Alaska to claim title to the submerged lands at issue under the Equal Footing Doctrine or the Submerged Lands Act. Certainly the claim could not have ripened after the 1971 disclaimer.

A deadline of 1959, however, does not leave much time for the establishment of historic inland water status. For example, even if the United States' arguments at the 1903 Alaska Boundary Tribunal had constituted a sufficient assertion of authority (and nothing prior had done so), that would leave only 56 years for the historic waters claim to ripen. That period resembles the period that was insufficient for the Nantucket Sound claim more than it resembles the much longer periods that were sufficient for the Mississippi Sound and Vineyard Sound claims.[37]

3. Acquiescence of Foreign Nations

The Court has held that the establishment of historic inland waters requires foreign nations to acquiesce in the assertion of authority to exclude their vessels. *See Alaska (Arctic Coast)*, 521 U.S. at 11. Given that Russia and the United States did not sufficiently assert authority over the waters of the Alexander Archipelago, it follows that foreign nations could not acquiesce. Some observations about the exhibits submitted nonetheless deserve comment.

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[37]If the Court were to conclude, contrary to the Special Master's recommendation, that Russia and the United States continuously asserted the right to exclude foreign vessels since 1824, the 135-year period between 1824 and 1959 would be long enough to satisfy the element of continuity.

First, Alaska has not produced any statement by the government of any nation confirming that it would acquiesce in exclusion of its vessels from the waters of the Alexander Archipelago. Alaska also has not presented any opinion from any expert in the law or policy of any foreign nation on the question whether the foreign nation would acquiesce.

Second, although the exhibits do not show any protest by foreign nations, this absence of protest proves very little in the circumstances of this case. The Court said in *Alaska (Cook Inlet)*: "In the absence of any awareness on the part of foreign governments of a claimed territorial sovereignty over [a body of water], the failure of those governments to protest is inadequate proof of the acquiescence essential to historic title." 422 U.S. at 200. Foreign nations had little basis for knowing that the United States was claiming the power to exclude foreign vessels for the reasons given above.

Third, Alaska says that Britain acquiesced in the seizure of the *Marguerite* for attempting to fish in violation of the Alien Fishing Act of 1906. *See* Alaska Count I Memorandum at 17. This contention lacks merit. Fishing regulations, as noted above, do not establish historic inland waters. Acquiescence in their enforcement, therefore, does not suffice. In any event, Britain immediately protested the seizure of the *Marguerite*; although Britain ultimately let the matter drop, it is difficult to see what else Britain realistically could have done to register its non-acquiescence.

Fourth, Alaska contends that Canada acquiesced in the United States' assertion of power during the Dixon Entrance negotiations and in discussions regarding salmon fishing. *See id.* at 25. As explained above, however, the documents do not

show that the United States and Canada formally agreed that the waters north of Dixon Entrance were inland waters. *See supra* part II.C.4.d. In any event, claims of jurisdiction to regulate fisheries do not amount to territorial claims.

Fifth, Alaska says that Britain and Norway's briefs in the *Fisheries Case* show that they acquiesced in the argument made by counsel for the United States at the 1903 Alaska Boundary Tribunal. *See* Alaska Count I Memorandum at 29-30. The briefs do not support this position. Although both parties cited the arguments made by counsel for the United States, they had no occasion to acquiesce in them. The *Fisheries Case* concerned whether Norway could draw straight baselines upon its coast, not whether the United States properly had drawn closing lines between islands located less than ten miles apart. Moreover, by the time of the *Fisheries Case*, the United States had endorsed contrary principles. *See supra* part II.C.3.

Sixth, Alaska argues that Britain endorsed the view that the United States could exclude vessels from the Alexander Archipelago during the 1893 Fur Seal Arbitration and 1910 Fisheries Arbitration. The Special Master, however, has rejected this interpretation of the documents. *See supra* parts II.C.2.b. & II.C.4.a. They therefore do not show acquiescence.

4. Vital Interests of the United States

In analyzing historic water claims, the Court has said that "a fourth factor to be taken into consideration is the vital interests of the coastal nation, including elements such as geographical configuration, economic interests, and the requirements of self-defense." *Alabama and Mississippi Boundary Case*, 470

U.S. at 102 (citations omitted). The parties disagree about the application of this fourth factor in this case.

Alaska contends that all the elements listed above support its claims. With respect to geographical configuration, Alaska says that the waters of the Alexander Archipelago bear a closer relationship to the coastal mainland than they do to the open seas. The State explains that the Archipelago has calm waters, shielded from ocean waves by its numerous islands. *See* Alaska Count I Memorandum at 46-47. As for economic interests, Alaska notes that the waterways within the Alexander Archipelago serve as the region's roads and that the inhabitants of the area have typically derived their living in one way or another from the sheltered waters. *See id.* at 47. On the issue of self-defense, Alaska says that effective efforts to protect Southeast Alaska must begin, and historically have begun, on the outer edge of the Alexander Archipelago. *See id.* at 47-49.

The United States has a different view. It says that the geographic configuration of the Alexander Archipelago counts against inland water status because the waters of the Archipelago are open at both ends and afford important international routes of travel. *See* U.S. Count I Opposition at 43. The United States contrasts the waters of the Archipelago to Mississippi Sound, which the Court described as a cul de sac little used by oceangoing vessels. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 103. The United States argues that economic considerations do not bolster Alaska's claim because Alaska would not benefit from the power to exclude vessels from waters of the Alexander Archipelago; on the contrary, the area benefits from the innocent passage of foreign cruise ships. *See* Count I Opposition at 43. Most significantly, the United States

rejects Alaska's contention that the requirements of national defense support historic inland water status. The United States explains that, as the world's leading naval power, the United States has a national defense interest in consistently supporting freedom of navigation domestically and abroad. *See* U.S. Count I Memorandum at 2-4. The United States further asserts that Alaska and the Court must defer to its judgment of defense requirements. *See* U.S. Count I Reply at 22.

Based on these considerations, the Special Master concludes that recognizing the waters of the Alexander Archipelago as inland waters is not vital to the interests of the United States. The United States would not gain much of value from the power to exclude foreign vessels from making innocent passage through the waters. Treating the waters as part of the United States' territorial sea, moreover, would not prevent the United States from reaping the economic benefits of the region. It also would not prevent the United States from barring hostile foreign naval vessels. *See* Convention, *supra*, art.14(4) (stating that innocent passage does not include passage that is "prejudicial to the peace, good order or security of the coastal State").[38]

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[38]Perhaps the United States could have made similar arguments in the *Alabama and Mississippi Boundary Case*. The Court's opinion, however, suggests that the United States conceded that Mississippi Sound was an internal waterway of commercial and strategic importance, and instead argued unsuccessfully that the Court should not consider this importance in deciding whether Mississippi Sound was a historic bay. *See* 470 U.S. at 105.

5. The Tarr Inlet Problem

The United States has raised an additional obstacle to recognizing the waters of the Alexander Archipelago as historic inland waters. This obstacle involves the Grand Pacific Glacier and Tarr Inlet. In 1912, the Grand Pacific Glacier retreated into Canada, bringing the waters of Tarr Inlet to the Canadian border. *See infra* Appendix N (depicting Tarr Inlet in 1938 in the northwest quadrant of the map). The Grand Pacific Glacier eventually advanced back over the border, but not until 1961. *See* Bruce F. Molnia, *Corrections to, and Analysis of Professor James Beget's Geologic Origin and Scientific Classification of Islands and Bays, Straits, Sounds, Entrances, Channels, and Passages of Southeast Alaska* 4 (2002) (Exhibit US-II-42) [hereinafter Molnia Corrections Report]. As a result, from 1912 until 1961, the waters of the Archipelago touched the shores of both Canada and the United States.

The United States argues that these facts prevent the waters of the Alexander Archipelago from qualifying as historic inland waters of the United States under article 7(6) of the Convention. *See* U.S. Count I Reply at 19 n.11. The United States contends that article 7(6) cannot apply because article 7(1) of the Convention specifies that article 7 "relates only to bays the coasts of which belong to a single State." Canada and the United States, it contends, cannot share historic inland waters from which they can exclude foreign vessels.

Alaska objects that it has not had an opportunity to respond to this argument because the United States first advanced it in its reply brief. *See* Tr. Oral Arg. at 106 (Feb. 3, 2003). Although the United States mentioned the Grand Pacific Glacier in its opening brief, *see* U.S. Count IV Memorandum at

24 n.11, the United States did not argue that the Glacier's retreat into Canada from 1911 to 1961 precluded recognition of a historic bay. Alaska therefore asserts that the United States waived this line of argument.

The Special Master believes that additional briefing would be required to resolve the parties' competing contentions. Although article 7(1) would appear to preclude application of article 7(6), at least one influential source suggests that two nations in some instances jointly may form historic inland waters. *See Juridical Regime*, *supra*, at 20-21, ¶¶ 145-147. Alaska's contention that the United States waived the Tarr Inlet argument also does not have a simple answer. The ordinary rules of civil procedure serve only as a guide in matters referred to a special master. *See* Sup. Ct. R. 17.2. Perhaps a minor procedural default should not decide a large and important dispute between a state and the United States.

The Special Master, however, has not required additional briefing on these issues because additional briefing most likely would prolong the case while yielding little actual benefit. The Court can and should avoid reaching issues concerning Tarr Inlet by deciding that no historic bay exists for the all of the other reasons stated above. The Special Master therefore does not make a recommendation regarding the Tarr Inlet problem in this report.

E. Conclusion

For the foregoing reasons, the Special Master concludes that the documents submitted do not establish that the waters of the Alexander Archipelago constitute historic inland waters. The Court therefore should grant summary judgment to the United

States on count I, and deny summary judgment to Alaska. The decree should order that Alaska takes nothing on count I of its amended complaint.

III. JURIDICAL BAYS (Count II)

Count II of Alaska's amended complaint alleges that most of the waters of the Alexander Archipelago lie within four juridical bays. Alaska claims title to pockets and enclaves of submerged lands lying within three miles of the closing lines of these bays, but more than three miles from the shore of the mainland or any island. Both Alaska and the United States have moved for summary judgment on this count. For the reasons stated below, the Special Master recommends that the Court grant the United States' motion, and deny Alaska's motion.

A. Overview

A juridical bay is a body of water having geographic features that satisfy criteria specified in article 7 of the Convention. *See* Appendix B *infra* (reprinting article 7). The waters landward of a juridical bay's closing line are inland waters. *See* Convention, *supra*, art. 5(1). Accordingly, under the Submerged Land Act, "the closing line of the bay becomes part of the coastline, and a State's boundary generally extends three miles beyond that closing line." *Rhode Island and New York Boundary Case*, 469 U.S. at 514. *See also* 43 U.S.C. § 1301(c) (defining the coast line to follow the "line marking the seaward limit of inland waters"). Under the Submerged Lands Act and the Equal Footing Doctrine, a new state acquires title to unreserved submerged lands lying within these boundaries. *See id.* § 1311(a)(1) (states have title to lands beneath inland navigable

waters within their boundaries); *Alaska (Arctic Coast)*, 521 U.S. at 5-6 (Equal Footing doctrine independently grants states title to lands submerged beneath navigable waters).

In count II of Alaska's amended complaint, Alaska alleges the existence of four "juridical bays" in the area of the Alexander Archipelago. *See* Amended Complaint, *supra*, ¶¶ 26, 27. The State calls the two largest bodies of water "North Bay" and "South Bay," names created for the purpose of this litigation.[39] The other two bodies of water are "Sitka Sound" and "Cordova Bay." In total, these bays cover much the same area that Alaska alleges to constitute historic inland waters in count I. *See* Alaska's Unopposed Motion for Leave to File an Amended Complaint at 3-4 n.2, *Alaska v. United States* (Dec. 14, 2000)

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[39]In its amended complaint, Alaska originally used the names "North Southeast" and "South Southeast" for what it now calls North Bay and South Bay. Amended Complaint, *supra*, ¶ 27. For convenience, this report will use the shorter terms. The Special Master does not mean to imply that these bodies of waters satisfy the requirements for juridical bays merely by calling them "Bays."

Anticipating the possibility that South Bay might not satisfy the requirements of article 7, Alaska's amended complaint contains the following statement: "In the alternative, the area described above as [South Bay] comprises more than one juridical bay." Amended Complaint, *supra*, ¶ 32. Alaska cites this paragraph in its opening brief, but does not make any argument to support the theory that South Bay may consist of more than one juridical bay. *See* Alaska Count II Memorandum at 4 n.2. The Special Master therefore has not addressed this possibility.

(No. 128, Orig.) (noting that the areas are similar but not identical).

Alaska claims that title to the unretained submerged lands lying behind the closing lines of these juridical bays, and the unretained submerged lands extending three miles seaward of these closing lines, passed to Alaska at statehood under the Equal Footing doctrine and the Submerged Lands Act. *See* Amended Complaint, *supra*, ¶ 38. The United States denies that these bodies of water satisfy the requirements of juridical bays under article 7 of the Convention. In the view of the United States, Alaska generally has title only to unretained lands lying within three miles of the coast line of the mainland and any islands. Accordingly, the parties dispute title to pockets and enclaves of submerged lands lying landward of the closing lines of the alleged juridical bays or within three nautical miles seaward of these closing lines, but more than three nautical miles from the shores of the mainland or any island.

The parties agree that Alaska must prevail on two general issues to establish the alleged juridical bays. The first issue is whether numerous islands in the Alexander Archipelago can be "assimilated" to each other or to the mainland to form the sides of the alleged juridical bays. The second issue is whether the alleged juridical bays, if formed by the assimilation of islands, meet the requirements stated in article 7 of the Convention.

Alaska contends that it deserves summary judgment because it can prevail on both issues. *See* Alaska Count II Memorandum at 4-5. The United States has sought summary judgment solely on the grounds that Alaska cannot prevail on the assimilation of islands issue. *See* U.S. Count II Memorandum at 3-4.

In its opposition to Alaska's motion, however, the United States also has argued that North Bay and South Bay do not satisfy the requirements for a juridical bay. *See* U.S. Count II Opposition at 3, 41-43.

As with count I, an initial question is whether summary judgment is the appropriate means of resolving count II. Federal district courts grant summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In this case, both parties have asserted in their written submissions and at oral argument that count II involves no material issues of fact. *See* U.S. Count II Memorandum at 2-3; Alaska Count II Opposition at 3-4; Tr. Oral Arg. at 70, 94 (Feb. 4, 2003).

The Special Master agrees with this assessment. The United States and Alaska have based their competing arguments on information contained in surveys, charts, publications, affidavits, and other documents. They do not dispute the authenticity of these documents or what they say. Almost all of the parties' disagreements concern legal standards or the application of the law to facts. Their minor factual disagreements do not appear to affect the outcome of the case. In these circumstances, a trial would not aid resolution of this matter. As one counsel put it at oral argument, "The Master has a phenomenal amount of evidence in front of him that the parties have been able to collect. . . . I'm afraid that if you had a trial you would hear

more, but I don't know that it would be any more helpful." Tr. Oral Arg. at 70 (Feb. 4, 2003).[40]

B. Factual Summary

The following summary briefly describes the areas that Alaska alleges meet the requirements of juridical bays. More details follow in the subsequent legal analysis.

1. North Bay and South Bay

Appendix D contains a map presenting the simplest and clearest representation of the areas Alaska calls North Bay and South Bay. North Bay is the area surrounded by the land colored in green at the top of the map. South Bay is the area surrounded by land colored in purple at the bottom of the map.

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[40]The United States has suggested that, although there are no material questions of fact, the Special Master "might benefit from hearing testimony on the controlling legal principles, which rest, in important part, on international law." U.S. Count II Memorandum at 3. Parties may prove the content of the law of a foreign country through testimony by expert witnesses. *See* Fed. R. Civ. P. 44.1. Even if this principle extends to testimony about the interpretation of a multilateral convention ratified by the United States, *see United States v. Urfer*, 287 F.3d 663, 665 (7th Cir. 2002) (upholding exclusion of international law testimony), expert testimony does not appear necessary in this case. The United States and Alaska thoroughly have briefed the applicable rules of international law. They have not specified what additional guidance expert testimony might produce.

Both North Bay and South Bay contain islands, all of which are colored in light blue on the map.

North Bay and South Bay are extremely large. North Bay has an area of 5,593 square nautical miles and its mouth, measuring from Cape Spencer to Cape Decision, is 154 nautical miles wide. South Bay has an area of 4,949 square nautical miles, and its mouth, measuring from Cape Decision to Tree Point on Cape Fox, is 120 nautical miles wide. To give some sense of the scale of these immense bodies of waters, the entire state of Connecticut has an area of only 5,544 square miles or 4,186 square nautical miles; Connecticut is thus smaller than either North Bay or South Bay.

Bays typically are indentations of water into unbroken land masses. North and South Bay do not fit this usual pattern. On the contrary, Alaska claims that four closely spaced islands, called Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island can be "assimilated" or deemed to be connected to each other and to the mainland. If these islands are assimilated, they effectively would form a constructive peninsula extending from the mainland. This constructive peninsula, Alaska contends, serves at once as the southern headland of North Bay and the northern headland of South Bay.

As shown in Appendix E, the four islands making up the constructive peninsula lie in a row in the center of the Alexander Archipelago. Together they form an area of land extending 95 miles in length and up to 55 miles in width. The westernmost of the four islands is Kuiu Island. Kuiu Island is long and narrow, running from north to south with many deep indentations along its shoreline. The island has an area of 745 square miles, making it the 15th largest island in the United States and

roughly a dozen times the size of the District of Columbia. Kuiu Island has some inhabitants, but no large population centers.

The next island from west to east is Kupreanof Island. Kupreanof Island has a rectangular shape, with a large inlet called Duncan Canal cutting into its southern side. The island has an area of 1,089 square miles, making it the 12th largest island in the United States and giving it roughly the same land area as the state of Rhode Island. Kake, its principal village, has a year-round population of about 800.

The third island is Mitkof Island. Mitkof Island is mountainous and wooded, and has a triangular shape. It has an area of 211 square miles, making it the 29th largest island in the United States. The island has a town called Petersburg, with a year-round population of about 3,300.

Dry Island, a small island close to the Alaskan mainland, has an area of only 11 square miles. It has a trapezoidal shape, about 4 miles wide on its north east side and 2 miles wide on its south west side. Dry Island is unpopulated and undeveloped.

Several bodies of water divide these four islands from the mainland and from each other. More specific information about these waterways appears below in the analysis in parts III.C.3.a-d of this report. The details are deferred because the parties disagree substantially about how to assess and describe various basic facts about the intervening waters.

Keku Strait divides Kupreanof Island and Kuiu Island. Keku Strait runs from Point Macartney in the north to Point Barrie in the south. It has a length of 41 nautical miles. Its mouths are 9 nautical miles wide in the north and south. In the center of

Keku Strait is an 18 nautical mile section called Rocky Pass, which is rocky, narrow, and shallow.

Wrangell Narrows separates Mitkof Island and Kupreanof Island. Wrangell Narrows is approximately 15 nautical miles long. It is about 1 nautical mile wide at its mouths, but considerably narrower in its middle portion.

Frederick Sound divides the northern parts of Mitkof Island and Kupreanof Island from the mainland. Frederick Sound is over 40 nautical miles long, and 7 nautical miles wide at is mouth.

Dry Strait lies between Dry Island and the southern part of Mitkof Island. The channel between the two islands has a length of about 4 nautical miles. Dry Strait is nearly 1 mile wide at high tide, but mostly bare at low tide.

The North Arm of the Stikine River runs between Dry Island and the mainland and empties into Frederick Sound. (The Stikine River is discussed at some length above. *See supra* parts II.C.1.b-c & II.C.2.a.) The river has a total length of over 200 miles and is navigable for most of that distance. The small portion flowing past Dry Island is short, narrow, and shallow.

2. Sitka Sound

Alaska claims that Baranof Island, Partofshikof Island, and Kruzof Island form the sides of a bay called Sitka Sound. These three islands lie on the western edge of the Alexander Archipelago and are depicted on the chart in Appendix F. Baranof Island has a long narrow shape running 90 miles from north to south, and at its greatest width is about 22 miles from west to east. Baranof Island is the ninth largest island in the

United States. With an area of 1,607 square miles, it is slightly larger than New York's Long Island. The city of Sitka, located on Baranof Island, has a population of about 8,600. Partofshikof Island is much smaller. It has an elliptical shape, about 7 miles long and a few miles wide with a total area of about 12 square miles. Kruzof Island has a rectangular shape and an area of approximately 172 square miles.

Two bodies of water separate the three islands, each roughly as long as Partofshikof Island. Intervening between Kruzof Island and Partofshikof Island is Sukoi Strait or Inlet. This water starts out deep but becomes very shallow. At low tide, some of the land between the two islands is above water. Running between Kruzof and Partofshikof Island on one side, and Baranof Island on the other is Neva Strait. A portion of Neva Strait known as Whitestone Narrows, approximately 4600 feet in length, historically was shallow and dangerous. Subsequent projects, however, have improved the channel. More details about these waters appear in the analysis below. *See infra* parts III.C.3.e-f.

3. Cordova Bay

Alaska claims that Prince of Wales Island and Dall Island can be assimilated to form the sides of a fourth juridical bay called Cordova Bay. Appendix 7 contains a chart depicting these islands. Prince of Wales Island is the third largest island in the United States. With an area of 2,231 square miles, it exceeds both Delaware and Rhode Island in size. Prince of Wales Island is about 135 miles long and 45 miles wide and has a highly indented coast line. Dall Island lies to the west of Prince of Wales Island. Dall Island is the 27th largest island in

the United States with an area of approximately 254 square miles. It has a narrow shape about 50 miles long from north to south and five miles wide from east to west.

The eastern arm of Ulloa Channel and Tlevak Strait divide Dall Island from Prince of Wales Island. The total length of the waterway is approximately 7 nautical miles, depending on how it is measured. The entrance on the west is 2 nautical miles wide, and the entrance on the east is approximately 1.75 nautical miles wide. The passage diminishes in size at a place called Tlevak Narrows, which is about 300 yards long and 700 yards wide. Again, more details about these waters appear below. *See infra* part III.C.3.g.

C. Assimilation of Islands

As indicated in the summary of facts, Alaska's claims in count II requires assimilation of land forms in a total of seven places: (1) between Kuiu Island and Kupreanof Island; (2) between Kupreanof Island and Mitkof Island; (3) between Mitkof Island and Dry Island or the mainland; (4) between Dry Island and the mainland; (5) between Kruzof Island and Partofshikof Island; (6) between Baranof Island and both Kruzof Island and Partofshikof Island; and (7) between Prince of Wales Island and Dall Island.

Based on factors considered in prior cases, and on the resolution of various disputes about these factors, the Special Master has assessed each of these proposed points of assimilation. In the Special Master's view, assimilation may occur between Mitkof Island and Dry Island, and between Partofshikof Island and Kruzof Island, but not at any other location.

These two points of assimilation do not suffice to establish the juridical bays claimed by Alaska.

1. Factors Considered in Prior Cases

Three original jurisdiction cases have addressed the assimilation of islands for the purpose of creating juridical bays. In the *Louisiana Boundary Case*, 394 U.S. 11, the Court confronted the question whether islands off the coast of Louisiana in the Mississippi-River Delta could be assimilated to the mainland for the purpose of forming the headlands of bays. *See id.* at 60-66) (footnote omitted). Although the Court recognized that islands generally play little role in delimiting bays, it said that "there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay." *Id.* at 61-62. In this regard, the Court observed:

> With respect to some spots along the Louisiana coast even the United States has receded from its rigid position [that islands may not be assimilated] and recognized that these insular configurations are really "part of the mainland." The western shore of the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation is such a formation, and is treated by the United States as part of the coast.

Id. at 63.

The Court said a "realistic" and "common-sense" approach determines when islands may be assimilated. *Id.* at 63, 64. The Court then identified several factors to consider. It said:

> While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland

> would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast.

Id. at 66. The Court indicated that this list of factors is "illustrative rather than exhaustive." *Id.* at 66 n.86. Elsewhere in the opinion, the Court identified an island's "origin . . . and resultant connection with the shore" as another factor to consider. *Id.* at 65 n.84.

The Court held, and Louisiana conceded, that the Isles Dernieres in Caillou Bay and the Chandeleur Islands in the Mississippi Delta did not qualify for assimilation. *See id.* at 67 & nn.87 & 88. It asked Special Master William P. Armstrong Jr. to determine whether other islands "which Louisiana has designated as headlands of bays are so integrally related to the mainland that they are realistically part of the 'coast' within the meaning of the Convention." *Id.* at 66. Special Master Armstrong considered and rejected each of Louisiana's claims that particular small islands and low-tide elevations should be assimilated to the mainland.[41] The Court subsequently adopted

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[41] *See* Louisiana Report, *supra*, at 36-37 (low water elevations in the area of Bucket Bend Bay not assimilable because they did not meet the criteria in *Louisiana*); *id.* at 38-39 (mudlumps in the area of Blind Bay not assimilable because of their insubstantial size and distance from the mainland); *id.* at 42 (islands in the area of Garden Island and Red Fish Bays not assimilable because they do not bear the requisite relationship to mainland); *id.* at 50-51 (Isles Dernieres in Caillou Bay not assimilable because the Court specifically said they were not in the *Louisiana Boundary Case*, 394 U.S. at 67 n.88);

Special Master Armstrong's report, rejecting Louisiana's exceptions. *See United States v. Louisiana*, 420 U.S. 529 (1975).

In a subsequent portion of the litigation, Special Master Armstrong concluded that Dauphin Island could be assimilated to the mainland, rendering Mississippi Sound a juridical bay. *See* Report of Walter P. Armstrong, Jr., Special Master at 16-18, *United States v. Louisiana* (Apr. 9, 1984) (No. 9, Orig.) [hereinafter Alabama and Mississippi Report]. The Court noted this conclusion when it reviewed the Special Master's report. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 100. The Court, however, ultimately did not have to reach this issue because it affirmed the Special Master's alternative conclusion that Mississippi Sound is a historic bay. *See id.* at 101.

In the *Rhode Island and New York Boundary Case*, 469 U.S. 504, the Court considered whether Long Island Sound is a juridical bay. Long Island Sound lies between Long Island and the mainland coasts of New York, Connecticut, and Rhode Island. A major issue in the case was whether Long Island could be assimilated to Manhattan and the Bronx, even though it was physically separated by the waters of the East River.[42]

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id. at 52-53 (low tide elevations in the area of Atchafalaya Bay not assimilable because of their size and location).

[42]Despite its name, the East River is not actually a river. The Court has explained: "The East River is unusual. Technically, it is not a river; neither can it be regarded as simply a tidal strait, connecting the Atlantic Ocean to Long Island Sound. Rather, it is part of the complex Hudson River estuary system, affected by both

See id. at 514-20. *See also* Exhibit US-II-22 (East River, New York (chartlet)). Special Master Walter E. Hoffman recommended assimilating Long Island. *See* Report of the Special Master at 47, *United States v. Maine* (U.S. Oct. Term. 1983) (No. 35, Orig.) [hereinafter Rhode Island Report].

The United States filed exceptions to Special Master Hoffman's report. It argued that Long Island could not be assimilated. It took the position that islands should be treated as headlands only in a few special situations, including:

> when the island is separated from the mainland by a genuine "river"; when the island is connected to the mainland by a causeway; when the island is connected to the mainland by a low-tide elevation; or when, as in the *Louisiana Boundary Case*, the shoreline is deltaic in nature.

469 U.S. at 517. The Court, however, rejected this position, saying: "Given the variety of possible geographic configurations, we feel that the proper approach is to consider each case individually in determining whether an island should be assimilated to the mainland." *Id.* (footnote omitted).

Considering the factors listed in *Louisiana*, and other factors, the Court concluded that Long Island could be assimilated. The Court emphasized the following points: (1) Long Island and the mainland almost completely surround the water in Long Island Sound, creating a pocket of water. *See id.* at 518. (2) The western end of Long Island, closest to New York City, "helps

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tidal action and the fresh water flowing from the Hudson River." *Id.* at 519 n.11 (citation omitted).

form an integral part of the familiar outline of New York Harbor." *Id.* (3) The East River, which separates Long Island from Manhattan, before dredging had a shallow depth of 15 to 18 feet and a dangerous current. *See id.* (4) The size of the East River in terms of width and depth was very small in comparison to the 118-mile length of Long Island Sound. *See id.* at 518-19. (5) Long Island and the adjacent shore shared a common geological history, formed by deposits and sediments brought by sheets of ice 25,000 years ago. *See id.* at 519. (6) Long Island Sound is not a route of international passage; on the contrary, ships traveling between points north and south of Long Island Sound typically pass Long Island on its seaward side. *See id.*

In No. 52, Original, *United States v. Florida*, Special Master Albert B. Maris also addressed the assimilation of islands. He recommended that the Florida Keys below the Moser Channel should not be assimilated to the Florida Keys above the Moser Channel. *See* Florida Report, *supra*, at 46-47. He reasoned that the Moser Channel, which has navigable depths from 10 to 15 feet, "so far separates the lower Florida Keys from the upper Keys as to negate a finding that the former should be regarded as a further extension of the mainland." *Id.* at 47. Special Master Maris, however, concluded that the upper Florida keys were eligible for assimilation in an area of "very shallow water which is not readily navigable and nearly all of which is dotted with small islands and low-tide elevations." *Id.* at 39. The parties, however, did not press this view of the upper keys, and the Court did not rule on the issue. *See United States v. Florida*, 425 U.S. 791 (1976) (decree).

2. Preliminary Disagreements about Factors

The parties agree that these precedents identify factors to consider when deciding whether to assimilate islands to each other or to the mainland. They nevertheless contest various aspects of these factors. Accordingly, before using the factors to assess the disputed assimilation points, a number of preliminary disagreements require resolution.

a. Identity of Intervening Waters

In both the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, the Court said that assimilation depends on characteristics of the "intervening waters." *Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 519. Alaska and the United States, however, disagree sharply about what constitutes the "intervening waters." This disagreement affects their analysis of nearly all of the points of assimilation.

Alaska argues that the relevant intervening waters between two land forms include only the waters that are "pinched," Alaska Count II Memorandum at 57, or in other words, only the waters where the opposing land forms "in fact come together," Alaska Count II Reply at 4. Alaska calls this area of water the "assimilation zone." Alaska Count II Memorandum at 13 n.5. For instance, as described above, a body of water called Keku Strait flows between Kuiu Island and Kupreanof Island. Keku Strait in its entirety has a length of 41 nautical miles and has an average width of about 4.5 nautical miles. Kuiu Island and Kupreanof Island, however, come very close together in an area called Rocky Pass. Rocky Pass is only 18 nautical miles in length, and has an average width of only .57 nautical miles

(1154 yards). Alaska views this small area as the relevant intervening waters between Kuiu Island and Kupreanof Island. *See id.* at 24. Accordingly, Alaska focuses its assimilation argument on the features of these "pinched" waters, and not on Keku Strait in its entirety.

The United States, in contrast, contends that the intervening waters include "the entire area across which the two land-forms of interest face one another." U.S. Count II Opposition at 7. For instance, under this definition, the United States would include all of the Keku Strait as the intervening waters between Kuiu Island and Kupreanof Island because the two islands face each other across the entire Strait. *See id.* at 16. As a result, the United States has a very different assessment of the features of the intervening waters.

Precedent offers little guidance on the question of how to delimit the intervening waters between two land forms. In the *Louisiana Boundary Case*, the Court and Special Master Armstrong did not specify the dimensions of the waters lying between the various islands that they considered. In the *Rhode Island and New York Boundary Case*, the Court and Special Master Hoffman treated the entire length of the East River as the intervening waters between Long Island and Manhattan and the Bronx. *See* 469 U.S. at 518-19; Rhode Island Report, *supra*, at 39-40. They did not, however, explain why they made this choice or give any definition of intervening waters.

The Special Master recommends that the Court now adopt the position of the United States for three reasons. First, Alaska's definition of intervening waters generally will produce uncertainty and the United States' definition generally will not. Alaska has offered no formal test for determining exactly where

two land forms "come together" or "pinch" the intervening waters. Accordingly, disagreements surely will arise about where the relevant intervening waters begin and end.

For example, as noted, Alaska regards the "intervening waters" between Kuiu Island and Kupreanof Island as being only the waters of Rocky Pass, not all the waters of Keku Strait. Rocky Pass, however, itself varies in width. Some parts of it, according to the exhibits, are over 2000 meters wide; the exhibits, however, indicate that for at least a mile the width of Rocky Pass is only about 400 meters or less. *See* AK-135 at HW 14382, HW 14383 (chartlets of Rocky Pass). If Alaska's general position regarding intervening waters were accepted, it would seem equally logical to regard the "intervening waters" between Kuiu Island and Kupreanof Island as being, not the whole 14-mile length of Rocky Pass, but only this one-mile stretch within Rocky Pass. Alaska offers no principles for deciding what to consider and what not to consider. Uncertainty of this kind surely will burden the Court in future coastal litigation. In addition, given that assimilation of islands may affect international borders, a vague standard may invite undesirable international controversies.

The United States' position has greater certainty because the United States has proposed using an objective method for delimiting intervening waters. In particular, the United States argues that the Court should use the "45-degree test" to identify the intervening waters. *See* U.S. Count II Opposition at 7-8. The 45-degree test says, in effect, that the open sea ends, and an inlet begins, when the shores of the two land forms bend more than 45 degrees away from the sea and toward each other.

Applying the 45-degree test to each end of intervening waters will establish where two opposing land forms face each other.

The Court explained the 45-degree test in the *Rhode Island and New York Boundary Case* when the Court approved using the test to establish the limits of a bay. The Court said:

> [The 45-degree test] requires that two opposing mainland-headland points be selected and a closing line be drawn between them. Another line is then drawn from each selected headland to the next landward headland on the same side. If the resulting angle between the initially selected closing line and the line drawn to the inland headland is less than 45 degrees, a new inner headland is selected and the measurement is repeated until both mainland-headlands pass the test. *See* P. Beasley, Maritime Limits and Baselines: A Guide to Their Delineation, The Hydrographic Society, Special Publication No. 2, pp. 16-17 (1977).

469 U.S. at 522 n.14. A more technical definition of the 45-degree test, illustrated with diagrams, appears in an influential paper written by Dr. Robert D. Hodgson and Dr. Lewis M. Alexander, both of whom have served as Geographer for the Department of State. *See* Robert D. Hodgson & Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls, Law of the Sea Institute Occasional Paper No. 13* at 10-12 (Apr. 1972) (Exhibit US-II.16).[43]

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[43]Using the 45-degree test to determine the entrance to a bay, Hodgson and Alexander say: "On the chart [included by the Special Master as Appendix I to this report], the outermost points which may

Although the Court has applied the 45-degree test to delimit bays, it has not used the test for identifying intervening waters. Hodgson and Alexander, however, specifically advocate using the test for this purpose. *See id.* at 17 (saying that closing lines on each end of intervening waters "would, of course, be determined by the application of the 45° test as in the bay situation"). Their recommendation deserves weight because the Court relied generally on their paper in the *Rhode Island and New York Boundary Case* to define the headlands of a bay. *See* 469 U.S. at 522 n.14.

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delimit the character of a bay are chosen. In the illustration, these are marked A and B. A line is drawn between points A and B to serve as the first bay-closing line. The next inward—i.e., landward of Line A-B—headland point is selected on one shore (A_1) and connected with point A. The line A-A_1, in effect, marks the general direction of the intervening coast or shore. [If] the angle formed by B-A-A_1 is more than 45°, the A-A_1 shore faces onto the bay and, conversely, if less than 45°, it faces more onto the sea. In the event that the latter condition prevails, the procedure is repeated, i.e. the line is drawn from B-A_1 and a third headland point A_2 is selected to determine the angle of the shore direction to the bay-closing line. The procedure is repeated until an angle of 45° or greater is encountered. The procedure, of course, should be carried out for the opposite shore concurrently until both angles meet the test. The natural entrance points of the bay have been located. The landward shore faces onto the bay and the seaward shore faces away from the bay towards the sea. The points marking the line of separation have been found and with them the closing line of the bay." Hodgson & Alexander, *supra*, at 10. Following this passage, Hodgson and Alexander address various special cases and exceptions. *See id.* at 10-12.

Second, the uncertainty inherent in Alaska's approach could make identification of the "intervening waters" highly manipulable. A broader or narrower determination of what constitutes the "pinched" waters might alter the assimilation analysis under the factors identified in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*. The United States rightly may worry that foreign nations could exploit the uncertainty in arguing for assimilation of islands that are not "realistically" parts of other land forms. *Louisiana Boundary Case*, 394 U.S. at 66.

Third, as a general rule, Alaska's approach would make assimilation substantially easier than the United States' approach. The "pinched waters" will always be smaller, and thus easier to ignore by assimilation, than the total waters between the facing shores of islands. In the *Rhode Island and New York Boundary Case*, the Court indicated that assimilation of an island to the mainland represents the "exceptional case," 469 U.S. at 517, and that "the general rule is that islands may not normally be considered extensions of the mainland for purposes of creating the headlands of juridical bays," *id.* at 519-20. The approach urged by Alaska therefore seems less supported than the method urged by the United States.

Although the Court should adopt the United States' definition of intervening waters on the basis of these considerations, Alaska makes several contrary arguments that deserve attention. Alaska principally justifies its position that the assimilation inquiry should focus on where the two land masses come together with the following reasoning:

> [I]f two land masses are *actually* connected by an isthmus of land . . . , they do not somehow become disconnected

> if there are bays on one or both sides of the isthmus, no matter how narrow that isthmus may be. Likewise, if two land masses separated by water are effectively or realistically connected at the place where they come together—no matter how narrow—it should be immaterial whether the intervening waters may also open into bays at one or both ends.

Alaska Count II Reply at 4 (emphasis in original).

The first sentence of this passage states an undisputed principle. For example, no one doubts that the northern part of Kuiu Island is connected to the southern part of Kuiu Island at its thin middle portion, regardless of the characteristics of the water on either side of the island. The second sentence also rings true; if two land masses are effectively connected at a place where they lie very close to each other, then the features of the water on either side of the effective connection also should not matter. But here the question is how to tell whether two land masses are effectively or realistically connected. Alaska's argument does not address this question.

Alaska also contends that the United States' position represents an "oversimplified or idealized vision of the coast [that] is divorced from the realistic view called for by the Court." *See* Alaska Count II Opposition at 28. This argument has less merit. In this case, the United States is not advocating per se rules for when assimilation may or may not occur as it did in the *Rhode Island and New York Boundary Case*. The question here is only how to define the intervening waters to permit individual consideration of the numerous factors identified in the Court's precedents.

Finally, Alaska contends that, in the *Rhode Island and New York Boundary Case*, the Court did not attempt to use the 45-degree angle test to define the intervening waters. Instead, the State says, the Court "focused its attention on the area where [Long Island] had the closest connection to the mainland." Alaska Count II Opposition at 26. These contentions are correct and they give the Special Master considerable pause. At bottom, however, the Special Master does not believe that the Court meant to establish a test for intervening waters when it looked at the characteristics of the East River. As noted above, the Court did not explain why it chose the East River as the intervening waters. The Court, moreover, said that assimilation depends on the "intervening waters" and did not qualify these words in any way. *See Rhode Island and New York Boundary Case*, 469 U.S. at 519. The Court did not speak of the "pinched intervening waters" or the "intervening waters where the land forms comes together." The Court also did not focus only on the narrowest portions of the East River.

b. Configuration or Curvature of the Coast

In the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, as previously observed, the Court said that assimilation of an island depends in part on the island's "relationship to the configuration or curvature of the coast." *Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. Alaska and the United States partially agree about the import of this factor, but also partially disagree.

Alaska and the United States concur in the view that an island has a relationship to the configuration or curvature of the

coast that is conducive to assimilation when the island is separated from the mainland or another island by a "riverine" channel of water. *See* Alaska Count II Memorandum at 12; U.S. Count II Memorandum at 26. The two parties have independently cited an objective test, proposed by Hodgson and Alexander, for determining when a channel has this character. *See* Alaska Count II Memorandum at 12; U.S. Count II Memorandum at 30 n.12. Hodgson and Alexander state that, for assimilation to occur, a channel of intervening waters should have a length-to-width ratio of three-to-one. *See* Hodgson & Alexander, *supra*, at 20. Although Alaska and the United States disagree about the definition of intervening waters, *see supra* part III.C.2.a, they both apply this test when addressing the islands that Alaska seeks to assimilate in this case. *See, e.g.*, Alaska Count II Memorandum at 14, 27, 54, 57; U.S. Count II Memorandum at 30 n.12, 44.

The United States, however, contends that inquiry into an island's relationship to the configuration or curvature of the coast also should take into account another consideration. In particular, the United States advocates examining how adding the island to the coast line would alter the coast line's form. In its view, assimilation is more appropriate when the assimilated island would form a natural extension of the coast line, and less appropriate when the assimilated island would create a peninsula sticking out perpendicularly from the coast. *See* U.S. Count II Memorandum at 26-28. For instance, the United States contends that the configuration of a peninsula created by the assimilation of Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island weighs against assimilation because it

would jut directly out from mainland. *See id.* at 28. Alaska, in contrast, does not view this consideration as significant.

The Special Master agrees with the United States. In the *Rhode Island and New York Boundary Case*, the Court emphasized that Long Island's "north shore roughly follows the south shore of the opposite mainland." 469 U.S. at 518. Moreover, in addition to advocating the three-to-one ratio test that both parties accept, Hodgson and Alexander also say that assimilation should occur when adding the island to the mainland would produce a "natural prolongation of the two dimensional coastline formation as viewed on a nautical chart." Hodgson & Alexander, *supra*, at 17 (footnote omitted). In contrast, if a landmass lies perpendicular to the mainland, that configuration should weigh against assimilation. No precedent exists for assimilating islands that create peninsulas leading straight out from the mainland.

c. Size of an Island

In the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, the Court said that the possibility of assimilating an island depends on the size of the island. *See Louisiana*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. The parties in the present case have very different views about this factor. The United States argues that small islands are more readily assimilable than large islands. *See* U.S. Count II Memorandum at 24. Citing Hodgson and Alexander's influential paper, the United States explains that small islands are easier to assimilate because islands "fictionally treated as mainland should not 'dwarf the true proportions of the original bay feature and hence change its

entire character.'" *Id.* (quoting Hodgson & Alexander, *supra*, at 17).

Alaska, in contrast, argues that larger islands generally are easier to assimilate than smaller islands. *See* Alaska Count II Memorandum at 8. Alaska relies on a treatise by Michael W. Reed, which says "assimilation is more likely to be justified . . . the larger the island in comparison to the breadth of the intervening waterway." *Id.* (quoting 3 Michael W. Reed, *Shore and Sea Boundaries* 296 (2000)). Alaska, accordingly, draws very different conclusions about the possibility of assimilating the large islands in this case.

The available precedents offer some grounds for each view. On one hand, support for assimilation of small islands appears in the *Louisiana Boundary Case*, where the Court cited with approval the United States' treatment of the "small clumps of land" near the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation as part of the coast. *Louisiana Boundary Case*, 394 U.S. at 63. On the other hand, support for assimilation of large islands comes from the *Rhode Island and New York Boundary Case*, where the Court approved the assimilation of Long Island, which is the tenth largest island in the United States, stretching 118 miles in length. *See* 469 U.S. at 518-519. In addition, Special Master Armstrong rejected assimilation of mudlumps "quite small in area" located off the coast of Louisiana because of their insubstantial size. *See* Louisiana Report, *supra*, at 38.

Taken together, these cases suggest that the absolute size of an island by itself offers little guidance on the question of assimilation. This conclusion, however, does not mean that size of an island is irrelevant. On the contrary, the size of an island

usually will affect consideration of other factors relevant to assimilation. For instance, the size (or length) of the island's facing shore directly determines the size and shape of the intervening waters between the island and the mainland. As explained previously, both the United States and Alaska have argued that an intervening channel of water generally should have at least a three-to-one ratio of length to width to permit assimilation. *See supra* part III.C.2.b. All else being equal, the longer the facing shores of the island and the mainland, the greater the ratio.

Similarly, the size of the island may determine the extent to which assimilation would alter the shape of the coast line. For example, a small island attached perpendicularly to the mainland would have less impact on the overall coast line than a large island similarly attached. Thus, depending on the configuration of the coast, a smaller island might be easier to assimilate.

d. Distance between Shores

Under the Court's precedents, the possibility of assimilating an island depends in part on the island's "distance from the mainland." *Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. This factor presents some difficulty because land forms generally have irregular shapes. As a result, the waters intervening between them do not have a constant width.

Both parties have dealt with this difficulty by relying on what they call the "average" width of the intervening waters. The two parties, however, calculate the average width in different ways. Alaska measures the width of intervening

waters at multiple locations, and then averages these measurements. The United States, in contrast, measures the width only at the two mouths of the intervening water.

The different measuring techniques naturally produce conflicting results. For example, both parties agree that Wrangell Narrows is the intervening water between Mitkof Island and Kupreanof Island. Alaska calculates the average width of Wrangell Narrows as 0.4 nautical miles (810 yards) based on 15 measurements of its width. *See* Alaska Count II Memorandum at 23 & Exhibit AK-135 at HW 14376, 14378-14380 (chartlets of Wrangell Narrows). The United States calculates the average width as "almost exactly" 1 nautical mile by averaging the widths only of its mouths. U.S. Count II Opposition at 19.

Alaska has the better approach. The more measurements taken at regular intervals, the closer an average of those measurements will approximate the actual average distance between the island and the mainland. The Court does not appear to have contemplated the limited measuring technique used by the United States.

e. Tide for Assessing the Intervening Waters

Under the Court's precedents, assimilation depends on the depth, width, and utility of the intervening waters. *See Louisiana Boundary Case*, 394 U.S. at 66; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. These characteristics of the waters, however, may vary sharply with the changing tide. As the tide rises, the intervening waters become deeper, wider, and generally more useful for navigation. The opposite happens

when the tide falls. The differences matter in some instances because Southeast Alaska has large tidal ranges.

With respect to measuring the width of the water (*i.e.*, the distance between the island and the opposite shore), the parties' initial briefs showed some disagreement. Both parties, however, now share the view that widths should be measured at low water.[44] *See* Alaska Count II Opposition at 23; U.S. Count II Reply at 11. The Special Master agrees with this joint position of the parties.

With respect to measuring the "utility" of the intervening waters, disagreement about the appropriate tide persists. Alaska has emphasized the inability of ships to use intervening waters at low water. *See, e.g.*, Alaska Count II Memorandum at 21; Alaska Count II Reply at 11. The United States objects, arguing that waters have utility if mariners can use them at high tide regardless of whether they can use them at low tide. *See* U.S. Count II Opposition at 11-12. The United States explains that tidal "variations do not impair utility because mariners routinely

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[44]Alaska contends, more specifically, that widths should be measured at "mean lower low water." Alaska Count II Opposition at 23. Some low tides are lower than others. The term "lower low water" refers to the "lowest of the low waters (or single low water) of any specified tidal day due to the declinational effects of the Moon and Sun." National Oceanic & Atmospheric Admin., *Tide and Current Glossary* 14 (2000). The term "mean lower low water" refers to the "average of the lower low water height of each tidal day" observed over a multi-year period *See id.* at 16. The distinction between "low water" and "mean lower low water" does not appear to make a difference in this case.

adjust their activities—as they have done for centuries—to coincide with predictable changes." *Id.* at 12.

The Special Master agrees with the United States. Many natural factors, including storms, ice, darkness, and tides, may prevent mariners from navigating otherwise useful waters for temporary periods. Nothing in the *Louisiana Boundary Case* or the *Rhode Island and New York Boundary Case* suggests that these factors should affect assessment of the utility of the waters. Attempting to take them all into account, moreover, would make the assimilation inquiry almost unmanageable.

A similar disagreement exists with respect to the depth of the water. Alaska generally focuses on the depth at low water. The United States, in contrast, emphasizes the depth at high water. For example, Alaska notes that Wrangell Narrows had an unimproved depth of only 10 feet at low tide, while the United States notes that it had an unimproved depth at high tide of 31 feet. *See* Alaska Count II Memorandum at 20-21; U.S. Count II Opposition at 19.

To the extent that measurements of depth serve as a proxy for navigational utility, they should not occur only at low water. As explained immediately above, the utility of a waterway does not depend on tides. Mariners can and do adjust the timing of navigation to avoid low water.

By contrast, to the extent that the depth is being measured to gauge the total volume of water that must be ignored to join two land forms by assimilation, consistency requires measuring the depth of the water at low tide. As noted above, the parties agree that the width of intervening waters is determined at low tide. No useful assessment of volume could come from measuring the depth at a different time.

f. Social and Economic Connections

In the *Rhode Island and New York Boundary Case*, Special Master Hoffman concluded that social and economic ties between Long Island and the mainland favored assimilation. *See* Rhode Island Report, *supra*, at 45-46. He noted:

> On a daily basis there is an enormous movement of people from Long Island to the mainland and from the mainland to Long Island. Additionally, the western end of Long Island is physically connected to the mainland, either directly or indirectly through Manhattan or Staten Island, by twenty-six bridges and tunnels.

Id. at 45. The Court adopted Special Master Hoffman's recommendation on assimilation, even though the United States filed exceptions to the report, arguing against giving weight to these "current social and economic ties between Long Island and the mainland." *Rhode Island and New York Boundary Case*, 469 U.S. at 510.[45]

[45]Although the Court adopted Special Master Hoffman's recommendation on assimilation, it did not refer to the specific social and economic connections that Special Master Hoffman mentioned in his report. The Court came closest to citing social and economic considerations in noting that the "western end of Long Island helps form an integral part of the familiar outline of New York Harbor." *Id.* at 518. A "harbor" is not just a sheltered body of water, but a body of water serving the function of providing a haven for safe anchorage of vessels. *See United States v. California*, 447 U.S. 1, 7-8 (1980); *Louisiana Boundary Case*, 394 U.S. at 37, n.42; California Report, *supra*, at 46-47; 1 Shalowitz, *supra*, at 60-62. Because providing safe anchorage for vessels is an economic and social function, the integral parts of New York Harbor, by definition, have at least some economic and social ties to each other.

Recognizing the failure of its argument in the *Rhode Island and New York Boundary Case*, the United States now opposes assimilation of islands in the Alexander Archipelago on the ground that the islands have no similar social or economic connection to each other or to the mainland. *See* U.S. Count II Memorandum at 39-40. It asserts that the islands in question are rural and are sparsely populated or even unpopulated. Alaska, however, responds that "social and economic comparisons to New York are out of place" when deciding whether to assimilate a wilderness area. Alaska Count II Opposition at 46. The United States has the better argument. To the extent that "current social and economic ties" weigh in favor of assimilation, then logically the absence of such connections must weigh against it.

g. Effect of Dredging and Improvements

Dredging has deepened and improved the navigability of several of the areas of intervening waters at issue in this case. This dredging raises the question whether the Court should assess the depth and utility of waterways according to their natural state or according to their improved condition after dredging. In its briefs, Alaska generally addresses the pre-improvement characteristics of waterways. For example, the State emphasizes that Rocky Pass prior to dredging had a

controlling depth[46] of only one foot, and that numerous rocks and strong currents prevented all but small vessels from passing through. *See* Alaska Count II Reply at 11. The United States, in contrast, usually highlights the post-improvement character of intervening waters. The United States points out, for instance, that vessels having a draft of 12 feet now can traverse Rocky Pass 40 percent of the time and that the fishing vessels, cannery tenders, and tugs with log rafts now regularly use the waterway. *See* U.S. Count II Memorandum at 38.

The Court did not specifically address this issue in the *Rhode Island and New York Boundary Case*. In its opinion, however, the Court did look at both the pre-dredging and post-dredging condition of the East River. The Court, for example, stressed that prior to improvement, the East River had a depth of 15 to 18 feet, with a rapid current making navigation hazardous. *See* 469 U.S. at 518. The Court, however, also looked at modern usage of the East River after improvement. *See id.* at 519. This approach comports with the view that assimilation depends not just on natural features but also on characteristics established by human activity, such as social and economic connections. *See supra* part III.C.2.f. The Special Master accordingly concludes that a realistic assessment of intervening waters requires consideration of their features both before and after improvement.

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[46]The "controlling depth" of a channel is the "minimum depth of the channel at mean low water as found in government surveys." *Cities Service Oil Co. v. Arundel Corp.*, 337 F.2d 842, 843 (2d Cir. 1964) (per curiam).

h. Geologic Origin of the Islands

In both the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, the Court said that assimilation of an island depends on the island's geologic "origin and [its] resultant connection with the shore." *Louisiana Boundary Case*, 394 U.S. at 65 n.84; *Rhode Island and New York Boundary Case*, 469 U.S. at 516. The parties agree, based on geologic studies, that the islands of the Alexander Archipelago originated in the Pacific Ocean millions of years ago, and then moved to their present location through plate tectonics. *See* Alaska Count II Reply at 12; U.S. Count II Opposition at 26-27. They disagree, however, about the significance of this evidence.

The United States argues that the geologic origin of the islands in Alexander Archipelago counts against assimilation because the material comprising the islands did not come from the adjacent Alaskan mainland. *See* U.S. Count II Opposition at 25. Alaska considers this feature of their origin immaterial. It observes that the same tectonic action that brought the islands to the Archipelago also brought the terranes (rock formations) that now make up much of mainland. As result, the island and mainland differ very little in their composition and for "tens of millions of years they have been welded together." Alaska Count II Reply at 13.

The United States has the stronger argument. The Court has made clear that an island is more readily assimilated to the mainland if the island consists of material that came from the mainland by sedimentation or other process. In the *Louisiana Boundary Case*, the Court said that "islands created by sedimentation at river entrances are peculiarly integrated with the mainland." 394 U.S. at 64-65 n.84. In the same case, Special

Master Armstrong similarly concluded that a non-fluvial origin weighs against the assimilation of an island. *See* Louisiana Report, *supra*, at 39. In the *Rhode Island and New York Boundary Case*, moreover, the Court emphasized that Long Island was "formed by deposits of sediment and rocks brought from the mainland by ice sheets" as a factor weighing in favor of assimilation. 469 U.S. at 519. This approach recognizes that, all else being equal, islands formed from earth and rocks coming directly from the mainland have a closer connection to the mainland than islands formed from material that did not come from the mainland.

i. Special Treatment of Fringing Islands

Under the Convention, the territorial sea of a nation generally begins at the coast line of the mainland. Article 4, however, contains a special rule that a nation may use for measuring the territorial sea in areas, like Southeast Alaska, where a fringe of islands intervenes between the mainland and the open sea. *See supra* part II.C.5.c (discussing the Pearcy charts illustrating how article 4 would apply). Article 4 of the Convention says:

> In localities where . . . there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

Convention, *supra*, art. 4(1). When straight lines are employed under article 4, the territorial sea begins not at the shore of the mainland, but instead at the shore of the islands and along the straight lines between the islands.

An important aspect of article 4 is that the decision whether to draw straight baselines between fringing islands is optional. Article 4 says that a nation "may" employ straight lines to establish the start of the territorial sea, but does not require a nation to use straight lines. The United States has never chosen to draw straight baselines under article 4. *See Alaska (Arctic Coast)*, 521 U.S. at 10 (citations omitted).

The United States contends that assimilation of Mitkof Island, Kupreanof Island, and Kuiu Island would render the option to use or not to use article 4 a nullity. *See* U.S. Count II Memorandum at 16-17. It explains that "the selective assimilation of the island-complex would *require* the United States, against its will, to treat the entire area enclosed within the Alexander Archipelago as inland water." *Id.* (emphasis in original) (citations omitted). This requirement, the United States feels, would negate the choice given by the text of article 4. The United States says that this "contrivance is impermissible, quite apart from application of the Court's multi-factor test." *Id.* at n.5.

Alaska responds that, while the United States may decline to draw straight lines under article 4, it cannot refuse to recognize juridical bays meeting the criteria of article 7 of the Convention. Those criteria, the State says, include the Court's recognition that islands may be assimilated to the mainland. *See* Alaska Count II Opposition at 12-13.

Alaska has the better argument. The United States' position does not find support in the Court's precedent. In the *Louisiana Boundary Case*, the Court was considering a body of water surrounded by fringing islands. In a footnote, the Court said:

> Louisiana does not contend that any of the islands in question is so closely aligned with the mainland as to be deemed a part of it, and we agree that none of the islands would fit that description.

394 U.S. at 67 n.88. This footnote suggests that the Court did not dismiss out of hand the possibility that fringing islands could be assimilated to create juridical bays; rather, it simply concluded that the islands in question were too far from the mainland to be assimilated. The Court also indicated that an area can meet the test of a historic bay even if the United States chooses not to draw straight lines. *See id.* at 77 n.104. For these reasons, the Special Master recommends against concluding that article 4 affects the question whether islands should be assimilated to each other or to the mainland.[47]

j. Geographical Obviousness

The United States proposes a new limitation on assimilation that the Court did not consider in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*. Specifically, the United States asserts that courts should not assimilate islands when their assimilation would create "geographically

[47]Long Island itself arguably forms part of a fringe of islands surrounding Long Island Sound that are amenable to connection by straight baselines under article 4. This fringe of islands would include Manhattan Island, Long Island, and Block Island. Although the Court did not consider this issue in the *Rhode Island and New York Boundary Case*, it held that Long Island could be assimilated to Manhattan Island, *see* 469 U.S. at 520, which in turn was assimilated to mainland New York across the Harlem River.

non-obvious" juridical bays. *See* U.S. Count II Memorandum at 18-22. The United States notes that, under the Convention, nations may exclude mariners from juridical bays. Accordingly, the United States reasons, mariners must be able to identify the entrance to inland waters through tools that are readily available, such as nautical charts. Mariners might have difficulty determining the presence of juridical bays, the United States says, if the bays' headlands consist of assimilated islands in areas that otherwise do not have the appearance of bays. The United States therefore considers it "imperative, to avoid international conflicts, that United States courts not set precedents that encourage coastal nations to apply assimilation principles in a contrived manner for the purpose of creating geographically non-obvious inland waters." *Id.* at 19. Alaska dismisses this concern, saying that the four alleged juridical bays are obvious, *see* Alaska Count II Opposition at 19, and that to avoid confusion, the United States could mark the bay's closing lines on its published charts, *see id.* at 20.

The Special Master concludes that the assimilation principles set forth in the *Rhode Island and New York Boundary Case* and the requirements of article 7 adequately address the concerns expressed by the United States. Under these cases, a court may find an island assimilated to the mainland only if a "realistic" assessment of the various factors indicates that the island should be considered part of the mainland. *Louisiana Boundary Case*, 394 U.S. at 63; *Rhode Island and New York Boundary Case*, 469 U.S. at 517. If courts adhere to this principle, assimilation should not occur in places where mariners could not expect it to occur. Moreover, once assimilation has occurred, a body of water will qualify as a juridical bay only if

it meets the specific criteria set forth in article 7 concerning the width of its mouth, its penetration into the coast, its total area, and so forth.

k. Sovereign Interests

The Court said in the *Rhode Island and New York Boundary Case* that "[t]he ultimate justification for treating a bay as internal waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast." *Rhode Island and New York Boundary Case*, 469 U.S. at 519 (citation omitted). Citing this statement, the United States contends that considerations of sovereign interests should affect decisions whether to assimilate islands. *See* U.S. Count II Memorandum at 22-24. In the view of the United States, the fundamental sovereign interest at stake is "the United States' longstanding interest in maintaining a consistent and coherent approach to coast line delimitation to promote this Nation's longstanding policy of freedom of the seas." *Id.* at 23.

The Special Master concludes that the Court took sovereign interests into account when it established the criteria for assimilation in the *Rhode Island and New York Boundary Case*. Indeed, as Alaska points out, the United States specifically has acknowledged that the result in the *Rhode Island and New York Boundary Case* is consistent with international law and the national interest. *See* Alaska Count II Opposition at 9 (citing Final Minutes of the Baseline Committee Meeting, May 2, 1985 (May 28, 1985) (Exhibit AK-320)). Adhering to the precedent of the *Rhode Island and New York Boundary Case*, accordingly,

should provide a consistent and coherent approach to coast line delimitation.

3. Analysis of Factors

Analysis based on the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, and the foregoing conclusions with respect to disagreements about the meaning of those cases, reveals that assimilation is warranted between Dry Island and Mitkof Island and between Partofshikof Island and Kruzof Island, but at no other locations.

a. Kuiu Island and Kupreanof Island

Alaska argues that Kuiu Island should be assimilated to Kupreanof Island. On the chart in Appendix E, Kupreanof Island appears in the middle of the page, with Kuiu island beneath it. The parties initially dispute the identity of the intervening waters between the two land forms. As noted above, Alaska identifies the intervening waters as the 18-nautical mile narrow central portion of Keku Strait called Rocky Pass. *See* Alaska Count II Motion at 24, 26. The United States says that the intervening waters consist of the entire 41-nautical mile length of Keku Strait. *See* U.S. Count II Opposition at 15-16.

The Special Master recommends that the Court adopt the United States' position. As the Special Master previously has concluded, the intervening waters between two land forms include all the waters lying between the facing shores. *See supra* part III.C.2.a. Using the objective 45-degree test for determining when opposing shores start to face each other, the closing lines for the intervening waters lie in the area of Point

Macartney, in the north, and Point Barrie, in the south. (These closing lines are marked in red and labeled "A" on the chart in Appendix E).

The documents submitted by the parties do not establish with precision the relevant area of Keku Strait. The United States has calculated the area to be 184.22 square miles at high tide. *See* The Island Complex, Water and Land Measurements (chartlet) at 1 (Exhibit US-II-10). Yet, as Alaska correctly objects, *see* Alaska Count II Opposition at 23, 28 n.15, and 44, the measurement of area should occur at low tide rather than high tide. *See supra* part III.C.2.e. Neither the United States nor Alaska has measured the low tide area of Keku Strait. The Special Master estimates that the area would be less than 184.22 square miles, but not substantially less because most of Keku Strait does not have extensive tidelands.

The documents submitted also do not establish with precision the relevant average width of Keku Strait. The United States says that the mouths of Keku Strait are on average nine nautical miles wide. *See* The Island Complex, Water and Land Measurements (chartlet) at 1 (Exhibit US-II-10). The relevant average width of Keku Strait, however, is the average width of the entire channel, and not just the average widths of its mouths. *See supra* part III.C.2.d. Dividing the area of a channel by its length may provide a rough estimate of the channel's width. On this basis, the Special Master estimates that the average width of Keku Strait is somewhat less than 4.5 nautical miles because Keku Strait is approximately 41 miles long and has, as noted, an average area of somewhat less than 184.22 square nautical miles.

While the ratio of length to width for Keku Strait (41 nautical miles to somewhat less than 4.5 nautical miles) easily satisfies Hodgson and Alexander's three-to-one ratio requirement, other factors weigh against assimilation. Even without a precise measurement, the average distance between the two islands clearly exceeds the distances between opposing land forms where the Court has previously recognized assimilation. The marshlands in the Lake Pelto-Terrebonne Bay-Timbalier Bay indentation, discussed in the *Louisiana Boundary Case*, 394 U.S. at 63, typically lay less than 200 yards from the shore. *See* Exhibit US-II-4 (chartlet depicting Louisiana mainland west of Lake Pelto). In addition, Long Island lies as close as half a mile from the mainland, *see Rhode Island and New York Boundary Case*, 469 U.S. at 518, and nowhere between Long Island and the shore does the East River exceed more than 1 nautical mile in width, *see* Exhibit US-II-22 (chartlet depicting the East River). Assimilation of Long Island to the mainland, in addition, required the Court to ignore only about 12 square nautical miles of water. Even without a precise measurement, 12 square miles clearly is far less than the estimated area of Keku Strait at low tide. *See id.*

The depth and utility of Keku Strait are more complicated factors. In the portions of Keku Strait on either side of Rocky Pass, the depth and utility of the waters weigh strongly against assimilation. These parts of Keku Strait have depths ranging from 60 to 100 feet. *See* US-II-32 (chartlet of Keku Strait). Water of this depth can support significant navigation. Moreover, given these depths, assimilation of these portions of Keku Strait would require the Court to ignore a tremendous volume of intervening water.

In the area of Rocky Pass, however, the depth and utility factors support assimilation. Before dredging, Rocky Pass had depths as shallow as one foot at low water, and its fast currents and rocks prevented navigation except by small craft at high water. *See Southeastern Alaska: Interim Report on Preliminary Examination and Survey of Harbors in Alaska*, H.R. Doc. No. 83-501, at 84-85 (1954) [hereinafter *Southeastern Alaska Interim Report*] (Exhibit AK-133). Dredging has improved Rocky Pass to some extent. The *Coast Pilot* (a navigation guide published by the U.S. Department of Commerce's National Oceanic and Atmospheric Administration) says:

> The pass is used by fishing vessels, cannery tenders, and tugs with log rafts. The draft which can be carried through depends on the tide. It is reported that 12 feet can be carried through 40 percent of the time, with a resultant saving of from 30 to 80 miles. Because of strong currents, narrow channel, and sharp turns, it is advisable to make passage at or near high-water slack.

8 National Oceanic & Atmospheric Admin., *United States Coast Pilot* 164, ¶ 164 (1999) [hereinafter *Coast Pilot*] (Exhibit US-II-18). *See also* U.S. Coast Guard, 17th Coast Guard District, Juneau, Alaska, *Relevant Portions of Most Recent Waterways Analysis And Management System Reports for Channels Separating Alleged Headlands of North Southeast, South Southeast and Cordova Bays and Sitka Sound from the Adjacent Mainlands* (Exhibit US-II-27 at 11-12) [hereinafter *Coast Guard Waterways Reports*] (reporting similar conclusions). This passage suggests that although many vessels now can navigate the waterway, Rocky Pass has less depth and less utility than the East River.

As stated previously, the intervening waters include all of Keku Pass and not just Rocky Pass. The assimilation inquiry, accordingly, has to take the entire area into account. On balance, the Special Master concludes that the depth and utility of the very deep and easily navigable portions of Keku Strait weigh more heavily against assimilation than the shallow and less navigable portions of Rocky Pass weigh in support of assimilation.

Two other factors also have significance. One is that Kupreanof Island and Kuiu Island undisputedly lack the social and economic connections that Special Master Hoffman considered important in the *Rhode Island and New York Boundary Case*. The other is that the geologic origin of the two islands does not support assimilation; neither island consists of material that originally came from the other island or from the mainland.

For all of these reasons, the Special Master recommends that the Court should not assimilate Kuiu Island and Kupreanof Island.

b. Kupreanof Island and Mitkof Island

Alaska also argues that Kupreanof Island can be assimilated to Mitkof Island across the body of water known as Wrangell Narrows. The chart in Appendix E depicts these islands. The parties agree on several points. Alaska and the United States both identify the entire 15-nautical mile length of Wrangell Narrows as the relevant intervening waters. *See* Alaska Count II Memorandum at 20; U.S. Count II Opposition at 18. They also agree that the shape and configuration of the two islands creates a long riverine channel, having a ratio of length-to-width

easily in excess of three-to-one. *See* Alaska Count II Memorandum at 23; U.S. Count II Opposition at 19. The parties, however, disagree about the proper calculation of the width of Wrangell Narrows. The United States measures the width at 1 nautical mile, while Alaska measures it at 0.4 nautical miles (810 yards). This difference stems from the parties' conflicting measurement techniques. Alaska has taken the average of fifteen separate measurements, while the United States has averaged the width of the two mouths. For the reasons given above, *see supra* part III.C.2.d, Alaska's measurement is preferable.

The parties also disagree about the depth of Wrangell Narrows. Alaska observes that Wrangell Narrows had an unimproved depth of only 10 feet at low tide, while the United States notes that it had a depth at high tide of 31 feet. *See* Alaska Count II Memorandum at 21; U.S. Count II Opposition at 19-20. Based on the reasoning given above, *see supra* part III.C.2.e, the low tide measurement has significance for assessing the total volume of water to be ignored, but the high tide measurement has importance for assessing the utility of the waters.

Several factors weigh in favor of assimilation. Wrangell Narrows is slightly narrower than the East River. As noted above, *see supra* part III.C.3.a, the East River has a width of between 0.5 nautical miles and 1 nautical mile. Wrangell Narrows is also slightly shallower. In its unimproved condition, the East River had a controlling depth of 15 to 18 feet. *See Rhode Island and New York Boundary Case*, 469 U.S. at 518. By the United States' own calculation, the total area of water in Wrangell Narrows is only 9.1 square nautical miles, *see* Island

Complex, Water and Land Measurements (chartlet) at 1 (Exhibit US-II-10), which is less than the 12 square nautical miles of water in the East River.

Other factors, however, weigh against assimilation. Wrangell Narrows long has had significant navigational utility. Before dredging, Wrangell Narrows was part of "the regular route taken by vessels running to all southeastern Alaska points from the ports on the Pacific coast of the United States and Canada." *Report of Preliminary Examination and Survey of Wrangell Narrows, Alaska*, H.R. Doc. No. 58-39, at 2 (1903) [hereinafter *Wrangell Narrows Report*] (Exhibit AK-146). In 1902, the "large traffic" through Wrangell Narrows included 19,090 passengers and 124,681 tons of cargo. *Id.* at 5. The Alaska Steamship Company and the Pacific Coast Steamship Company made 187 transits through the Narrows in a single year. *Id.* at 13. The U.S. Army Corps of Engineers reported at the time that "[s]teamers use this channel throughout the year and in summer there is an average of a least one vessel going through per day." *Id.* at 3. It further said that "[t]he channel through Wrangell Narrows is used by all vessels running to southeastern Alaska points from ports on the Pacific coast." *Id.* at 4.

To the extent that post-dredging conditions matter to the assimilation inquiry, *see supra* part III.C.2.g, they also count against assimilation. The *Coast Pilot* says that Wrangell Narrows traffic includes "cruise ships, State ferries, barges, and freight boats carrying lumber products, petroleum products, fish and fish products, provisions, and general cargo." 8 *Coast Pilot*, *supra*, at 168, ¶ 251. Other reports indicate that large vessels can use the waters. *See Coast Guard Waterways*

Reports, *supra*, § 2-1-7 (Exhibit US-II-27 at 3); Robert W. Smith, *Report On Alaska's Juridical Bay Claims* 50 (Exhibit US-II-1).

Another factor weighing strongly against assimilation of Kupreanof Island to Mitkof Island is the purpose for which vessels use Wrangell Narrows. In the *Rhode Island and New York Boundary* case, the Court emphasized that Long Island Sound is not used as a strait, but instead is treated as a bay. It explained that ships traveling between points to the north and south of the Sound do not travel through the Sound via the East River, but instead go around the outside of Long Island. *See* 469 U.S. at 519. Hodgson and Alexander similarly stress that the intervening waterway "should ideally be channel-like but *it should not form a principal channel of navigation*." Hodgson & Alexander, *supra*, at 20 (emphasis added).

Wrangell Narrows differs from the East River in this respect. Wrangell Narrows long has served as part of the "usually traveled route" from Seattle to Skagway. *Wrangell Narrows Report*, *supra*, at 5. Most ships entering North Bay do not pass around South Bay and enter North Bay through North Bay's mouth, but instead enter South Bay and reach North Bay by traveling through Wrangell Narrows. *See Representative Portions of Maps Indicating Commercial Transit Routes Between Islands Said By Alaska To Be Part Of The Mainland* (Exhibit US-II-31). Wrangell Narrows thus serves as the principal opening between the two bodies of waters and, as a result, South Bay is not "used as one would expect a bay to be used." *Rhode Island and New York Boundary Case*, 469 U.S. at 519. *See also* Westerman, *supra*, at 146 ("Any bay, whether formed partially by islands or not, will by virtue of its land-

locked nature not serve as a principal route of international navigation.").

Two other factors also count against assimilation. First, Kupreanof Island and Mitkof Island do not have a geologic origin weighing in favor of assimilation. Alaska does not contend that either island was formed from material coming from the other island or from the mainland. Second, the islands also lack the extensive social and economic connections cited by Special Master Hoffman in the *Rhode Island and New York Boundary Case*.

In sum, the question is close. Wrangell Narrows has some geographic features resembling the East River. But additional factors counsel a different treatment of the two waterways. On balance, the Special Master concludes that Kupreanof Island should not be assimilated to Mitkof Island.

c. Mitkof Island and Dry Island

The next point of contention involves Mitkof Island and Dry Island. These two islands appear in the upper right hand corner of the small-scale map in Appendix E. The large-scale chart in Appendix H depicts these islands in more detail.

Alaska makes two alternative arguments with respect to Mitkof Island and Dry Island. One argument is that an isthmus of land actually connects Mitkof Island to Dry Island at low water, making the two "islands" in reality a single land form. *See* Alaska Count II Opposition at 31; Alaska Count II Reply at 4. The other contention is that Mitkof Island and Dry Island are separate land forms, but satisfy all of the requirements for assimilation in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*. *See* Alaska Count II

Memorandum at 7-19; Alaska Count II Opposition at 30-35. The United States disputes both of these contentions.

The clearest evidence shows that Dry Strait, as its name suggests, is dry or mostly dry at low tide. A United States Geographical Survey topographic map, included in Appendix H, labels Dry Strait as "mud flats." USGS Petersburg C-2 Quadrant Alaska Topographic Map (1997) (Exhibit AK-334). A mud flat is "a level tract lying a little depth below the surface of the water or alternately covered and left bare by the tide." *Merriam-Webster's Third New International Dictionary* 1482, 866 (Philip B. Gove ed. 1969) (definition of "flat" and "mud flat"). The Alaska District of the U.S. Army Corps of Engineers similarly describes the area of Dry Strait between Mitkof Island and Dry and Farm Islands as being "above MLLW" (i.e., above mean lower low water). *See* Alaska District, U.S. Army Corps of Engineers, 2001 Project Maps & Index Sheets (excerpt) (Exhibit AK-338 at 9). The *Coast Pilot* says that Dry Strait is "mostly bare at low water." 8 *Coast Pilot*, *supra*, at 167, ¶ 242. A congressional study found that the "Stikine river has deposited sufficient material at its mouth to nearly connect Mitkof Island to the mainland at low tide." *Southeastern Alaska Interim Report*, *supra*, at 31. A declaration from an experienced mariner in the area asserts that no channel passes through Dry Strait at low tide. *See* Exhibit AK-341 ¶¶ 5,8,9 (declaration of Mr. Jim Bailey).

Under the Convention, however, a connection at low tide does not suffice to convert two islands into a single land mass. The Convention defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." Convention, *supra*, art. 10(1). Under this definition, Dry Island and Mitkof Islands are separate islands because they are both surrounded by water at high water, even if they are connected at low water. As result, if the two islands are to be connected, they have to be assimilated pursuant to the analysis used in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*.

Several of the factors in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case* counsel against assimilation of Mitkof Island to Dry Island. Although small in size, Dry Island has a shape that would alter the configuration of Mitkof Island; if assimilated, Dry Island would stick out perpendicularly from an otherwise straight coast on the larger island. The origin of the islands also do not support assimilation because the material making up Dry Island did not come from Mitkof Island or vice versa. In addition, the two islands do not have strong social or economic connections like those between Long Island and Manhattan Island.

The utility of the intervening waters provides more mixed guidance. On one hand, according to the Army Corps of Engineers, the shallow "depth and channel width make it impossible for small or large general cargo ships, passenger vessels, or the Alaska Marine Highway (ferry) system to use the existing waterway." U.S. Dep't of the Army, *Navigation Improvements Interim Reconnaissance Report: Dry Strait/Wrangell Narrows, Alaska* 40 (1994) (Exhibit AK-139). On the other hand, some vessels do navigate the area. The water is used "by log towing companies and small recreation craft." *Id.* Dry Strait also is "extensively used by fishing boats and towboats operating between the towns of Wrangell and Petersburg." 8 *Coast Pilot*, *supra*, at 167, ¶ 242. In addition,

"[t]ugs up to 82 feet with a beam of approximately 25 feet and a draft of 10 feet transit this waterway towing logs, en route [to] logging operations to the north and south of Dry Strait in Southeast, AK." *Coast Guard Waterways Reports*, *supra*, at Exhibit US-II-27, p. 6.

The deciding factors, however, are the distance between the two islands and the depth of the intervening waters. The United States argues that the relevant intervening waters for measuring these physical characteristics include not only Dry Strait but also all of Frederick Sound and certain waters south of Dry Island between Mitkof Island and the mainland. *See* Appendix E (chart depicting closing lines in red). These points mark the limits of the channel under the 45-degree test advocated by Dr. Hodgson and Alexander.

The United States' view would be correct if the physical properties of intervening waters were measured at high water. During high tide, a continuous channel flows between the mouth of Frederick Sound and the southern waters. As both parties agree, however, the physical properties of intervening waters are measured at low water. *See supra* part III.C.2.e. At low water, the points identified by the United States cannot define the channel because the channel ceases to exist. The area, although wet in places, is mostly bare. As a result, the two islands effectively have no intervening waters between them. In this situation, Hodgson and Alexander's test for measuring the start and end of the channel cannot apply.

In the Special Master's view, these factors outweigh all of the other factors in deciding whether assimilation should occur. Any other conclusion simply would not square with the "realistic" approach required by the *Rhode Island and New York*

Boundary Case and the *Louisiana Boundary Case*. Accordingly, the Special Master recommends that the Court approve assimilation between Dry Island and Mitkof Island across Dry Strait.[48]

d. Dry Island and the Mainland

As depicted in Appendix H, the north arm of the Stikine River separates Dry Island from the Alaskan mainland. Alaska presents two arguments for why this separation should not matter. Alaska initially contends that Dry Island should be treated as part of the mainland, without reference to assimila-

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[48]In Alaska's opposition brief, Alaska briefly raises an alternative theory not averred in its complaint or presented in it original motion for summary judgment. The theory is that Mitkof Island actually is a peninsula of the mainland. Alaska notes briefly that the same United States Geological Survey map (reproduced in Appendix H) that shows Mitkof Island connected to Dry Island also shows that Mitkof Island is directly "connected to the mainland by mud flats—without interruption even by any outlet channel of the Stikine—east of the point tellingly marked, 'Trouble.'" Alaska Count II Opposition at 32 (citing AK-334). The United States objects that this alternative theory is not credible because it would suggest that "for some period of each day the Stikine River ceases to flow across the tide flats at its mouth." U.S. Count II Reply at 18-19. In the absence of any additional corroborating evidence, and given that Alaska did not raise the issue earlier, the Special Master agrees with the United States that Mitkof Island is not a peninsula extending from the mainland. Alaska, however, has shown that Dry Strait contains so little water at low tide that Mitkof Island and Dry Island should be assimilated.

tion standards, because the island lies in the mouth of a river and therefore forms part of the coast line.[49] *See* Alaska Count II Memorandum at 7-8; Alaska Count II Reply at 8-9. The United States agrees that Dry Island forms part of the coast line, but rejects the proposition that Dry Island therefore is automatically an extension of the mainland for the purpose of forming a bay. *See* U.S. Count II Opposition at 22. Instead, the United States insists that, if Dry Island is to form part of the peninsula separating North Bay and South Bay, it must be assimilated to the mainland across the North Arm of the Stikine River.

The parties have cited, and Special Master's independent research has uncovered, only one source addressing the specific issue of whether an island that forms part of the coast line automatically is treated as part of the mainland. Special Master Armstrong recommended that Dauphin Island could be assimilated because it abutted the inland waters of Mobile Bay. *See* Alabama and Mississippi Report, *supra*, at 18.[50] This recom

[49]The term "coast line" refers not just to the shore but also to the "line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c). The coast line, accordingly, may cross bodies of waters, like the mouth of a river. In so doing, the coast line may encounter an island, the seaward shore of which then also forms part of the coast line.

[50]Special Master Armstrong had previously concluded that islands could not become part of the mainland through assimilation to nearby inland waters (as opposed to land). *See* Louisiana Report, *supra*, at 42. He explained: "It seems apparent that when in its opinion the Court used the term 'mainland,' it used it to refer to an existing body of land and not to inland waters. Otherwise, a small island lying

mendation, however, has little if any precedential value. The United States filed exceptions contesting Special Master Armstrong's analysis and the Court did not adopt it. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 101, 115. In fact, without any clear explanation, Alaska itself now characterizes Special Master Armstrong's treatment of Dauphin Island as "flawed." Alaska Count II Opposition at 22 n.9.

The text of the Convention leads the Special Master to conclude that an island does not automatically become part of the mainland, for the purpose of creating a bay, even though the island may form part of the coast line. Article 10, as noted, defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." Convention, *supra*, art. 10(1). This definition draws no distinction between islands forming part of the coast line and other islands. Dry Island, accordingly, is an island. As an island, it must be assimilated to the mainland to form part of the peninsula alleged to separate North Bay and South Bay.[51]

many miles from the nearest solid land might by virtue of its proximity to a bay closing line be considered an extension of the mainland." *Id.*

[51]In the *Rhode Island and New York Boundary Case*, 469 U.S. at 520, the Court approved the assimilation of Long Island to Manhattan Island without discussing Manhattan Island's relationship to the mainland. The United States has acknowledged that Manhattan Island could be assimilated to the New York mainland across the small Harlem River but not the much larger Hudson River. *See* Tr. Oral Arg. at 69-70 (Feb 4, 2003).

Alaska alternatively asserts that Dry Island can be assimilated based on an argument made by the United States in the *Rhode Island and New York Boundary Case*. *See* Alaska Count II Reply at 9. In that case, as discussed above, the United States contended that the Court should recognize assimilation only for a few classes of islands, including islands "separated from the mainland by a genuine 'river.'" *Rhode Island and New York Boundary Case*, 469 U.S. at 517. Alaska interprets this contention to mean that islands separated from the mainland by a river, like Dry Island, "are properly assimilated." Alaska Count II Reply at 9.

The Special Master disagrees. Alaska has not correctly interpreted what the United States argued in the *Rhode Island and New York Boundary Case*. When the United States identified classes of islands for which assimilation is possible, the United States was not asserting that any island automatically can be assimilated across any river without regard to other considerations. On the contrary, the United States was contending that an island not only must satisfy the criteria of the *Louisiana Boundary Case*, but also had to fall within a limited class of cases for which assimilation may occur. *See* Exception of the United States and Supporting Brief at 6-7, 12, *United States v. Maine (Rhode Island and New York)* (1984) (No. 35, Orig.) (noting that the list of factors in Louisiana was not exclusive and arguing that in actual practice assimilation had been further limited).

Possibly under the multiple factors set forth in the *Louisiana Boundary Case* and the *Rhode Island and New York Boundary Case*, Dry Island could be assimilated to the mainland across the North Arm of the Stikine River. Alaska, however, does not

make this contention and has not addressed these factors. *See* Alaska Count II Reply at 9 (stating only that they "obviously" support assimilation). The United States also has not briefed the issue.[52] The Special Master, accordingly, hesitates to speculate about the conclusion. However, even if Alaska could demonstrate that Dry Island should be assimilated to the mainland, and even if Mitkof Island therefore should be assimilated to the mainland, the assimilation would still stop at the end of Mitkof Island and would not connect Kupreanof Island. As a result, there still would not be enough assimilation to turn what Alaska calls North Bay and South Bay into juridical bays within the meaning of the Convention.

e. Partofshikof Island and Kruzof Island

Alaska argues that the features of Partofshikof Island, Baranof Island, and Kruzof Island establish Sitka Sound as a juridical bay. Appendix F depicts these islands. Intervening between Kruzof Island and Partofshikof Island is a body of water known as Sukoi Strait or Inlet. This water starts out deep but becomes very shallow. At high tide, the *Coast Pilot* says that only canoes can pass between Kruzof Island and Partofshikof Island. *See* 8 *Coast Pilot*, *supra*, at 232, ¶ 227. At low tide, the land between the two islands rises above the water line. A federal government nautical chart shows that Partofshikof Island and Kruzof Island are connected at low water. *See*

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[52]In its opposition brief, the United States specifically noted that Alaska had left the question of Dry Island's assimilation as an unanswered obstacle to the creation of a juridical bay. *See* U.S. Count II Opposition at 22.

Exhibit AK-175 (chart extract showing Sitka Sound to Salisbury Sound Inside Passage).

Alaska argues that Partofshikof Island is "properly considered part of Kruzof Island." *See* Alaska Count II Memorandum at 49. Although the United States initially characterized Partofshikof Island as an independent feature, *see* U.S. Count II Memorandum at 43, the United States now agrees with Alaska that the two islands should be treated as one, *see* U.S. Count II Reply at 21. The Special Master sees no basis for disagreeing with this conclusion.

f. Kruzof, Baranof, and Partofshikof Islands

Alaska's claim that Sitka Sound is a juridical bay requires assimilating Baranof Island to Kruzof Island and the assimilated Partofshikof Island. A few features support this view. The islands, if joined at Neva Strait, would form a land mass having a wishbone shape. This water is recognizable as Sitka Sound in much the same way that Long Island, when assimilated at the East River, encloses Long Island Sound. In addition, the waters have a riverine shape satisfying the Hodgson and Alexander three-to-one ratio requirement.

Other factors, however, all weigh against assimilation. The Coastline Committee determined that Kruzof Island and Baranof Island could not be assimilated in part because "Neva Strait . . . was too broad and deep to be ignored." Minutes of the Committee on the Delineation of the United States Coastline at 3 (Sept. 20, 1971) (Exhibit AK-174). The parties have not calculated the average width of the channel at low tide, but a visual inspection of the chart included in the exhibits tends to

support the Coastline Committee's conclusion. *See* Sitka Sound, Northern Entrance (chartlet) (US-II-58).

The waters also have sufficient depth and utility to support important navigation. The Coast Guard says that "vessel traffic in the waterway is significant including barges, fishing vessels, charter boats, pleasure craft and Alaska State Ferries with lengths up to 400 ft. and drafts up to 18 ft." *Coast Guard Waterways Reports*, *supra*, at Exhibit US-II-27, p. 20. Man-made improvements have facilitated this traffic, but vessels used the route even before improvements. The United States points out that maps from the late 1890s show passages through Neva Strait. *See* Representative Portions of Maps Indicating Commercial Transit Routes Between Islands Said By Alaska To Be Part Of The Mainland 4, 11 (Exhibit US-II-31). Perhaps more important than the volume of the traffic is how vessels use the waters. Most vessels enter and exit Sitka Sound through Neva Strait, rather then through what Alaska would describe as the mouth of the alleged bay. *See Report on Sergius Narrows and Whitestone Narrows, Alaska*, S. Doc. No. 90-95, at 8 (1968) (Exhibit AK-177). Sitka Sound thus is not "used as one would expect a bay to be used." *Rhode Island and New York Boundary Case*, 469 U.S. at 519.

The islands also lack the kind of social and economic connection found by the Special Master in the *Rhode Island and New York Boundary Case*. In addition, as explained above, the geologic history of the islands shows that neither was made from material coming from the mainland or other islands. For these reasons, the islands cannot be assimilated.

g. Prince of Wales Island and Dall Island

Alaska's claim that Cordova Bay is a juridical bay requires assimilation of Dall Island to Prince of Wales Island. Appendix G contains a chart depicting these islands. The parties principally disagree about how to identify the intervening waters. Alaska says that they are the Tlevak Narrows. *See* Alaska Count II Memorandum at 55. The Tlevak Narrows occupy an area about 300 yards long and 700 yards wide. *See* Exhibit AK-180 (chart extract depicting Northern Part of Tlevak Strait and Ulloa Channel); Exhibit US-II-59 (chart depicting Alaska's proposed assimilation zone). The United States, on the other hand, identifies the intervening waters as a 7-nautical mile stretch of Ulloa Channel and Tlevak Strait. *See* Northern Entrance to Cordova Bay, Large Scale (charlet) (Exhibit US-II-39) [hereinafter Ulloa Chartlet]; U.S. Count II Opposition at 23-24 & n.9 (revising earlier measurement in U.S. Count II Memorandum at 44). This area is 2 nautical miles wide in the west and about 1.75 nautical miles wide in the east. *See* Ulloa Chartlet, *supra*. Again, based on the conclusion that the intervening waters include all the waters between the facing sides of the islands, *see supra* part III.C.2.a, the Special Master accepts the United States' view.

With the intervening waters identified in this manner, the relevant factors weigh heavily against assimilation. Although the waters have a riverine shape, with a length-to-width ratio of more than three to one, the average distance between the islands appears to exceed the distances in the *Rhode Island and New York Boundary Case* and the *Louisiana Boundary Case*. *See* Ulloa Chartlet, *supra* (depicting area). The utility of the waters also counts against assimilation. The waters are deep and

support substantial traffic. Ships may sail from Cordova Bay through the intervening waters to reach Bucareli Bay. *See* 8 *Coast Pilot*, *supra*, at 142-143, ¶¶ 234-253. The Coast Guard says that up to 150 commercial fishing vessels use this passage each week during summer months. *See Coast Guard Waterways Reports*, *supra*, at US-II-27, p. 14. In addition, barges up to 221 feet long use the route. *See id.*

The size and shape of the islands, and their relationship to the configuration or curvature of the coast do not support assimilation. The islands do not create a natural extension of the coast. In addition, as with the other assimilation points, the origin of the islands and the lack of economic and social connections between the islands are not factors weighing in favor of assimilation. Neither island was formed from material coming from the other. The sparsely populated islands lack the close social and economic connections that Special Master Hoffman observed in the *Rhode Island and New York Boundary Case*. For these reasons, Prince of Wales Island and Dall Island cannot be assimilated to each other.

4. Conclusion with Respect to Assimilation

The Special Master concludes that assimilation is warranted between Dry Island and Mitkof Island and between Partofshikof Island and Kruzof Island, but at no other locations. These connections do not suffice to create the juridical bays alleged by Alaska. Accordingly, Sitka Sound and Cordova Bay and the waters Alaska calls North Bay and South Bay do not constitute inland waters. Alaska, therefore, did not acquire title to submerged lands in these areas beyond three miles from their coasts.

If the Court agrees with this conclusion, it should grant summary judgment to the United States on count II, and deny summary judgment to Alaska. If the Court disagrees with these recommendations, it then must consider whether the land forms created by assimilated islands have configurations satisfying the criteria for juridical bays under article 7 of the Convention.

D. Juridical Bays under Article 7

Even if assimilation could occur at each of the locations considered above, the waters that Alaska calls North Bay, South Bay, Sitka Sound, and Cordova Bay still would have to satisfy the requirements of article 7 to qualify as juridical bays. Examining article 7 yields the conclusion that North Bay and South Bay would not constitute juridical bays but Sitka Sound and Cordova Bay would.[53]

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[53]The United States has asked the Special Master not to address this second issue if Alaska's assimilation theory fails. *See* U.S. Count II Memorandum at 3. It reasons that the Special Master should not express an opinion on matters not essential to the resolution of the summary judgment motion, and this second issue does not arise if Alaska loses the first issue. The Special Master appreciates this concern, but nonetheless addresses the second issue for the convenience of the Court. The Court may disagree with some or all of the Special Master's recommendations with respect to assimilation or may find the requirements of article 7 easier to address. Other Special Masters have made alternative recommendations. *See, e.g.*, *California*, 381 U.S. at 172-73 (Special Master considered whether Monterey Bay was a historic bay or a juridical bay).

1. Definition of a Bay under Article 7(2)

The first paragraph of article 7 of the Convention says that article 7 "relates only to bays the coasts of which belong to a single State." Convention, *supra*, art. 7(1). The second paragraph then defines a "bay" as follows:

> For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

Id. art. 7(2).

This definition has many elements. To apply just the first sentence of the definition in article 7(2), a court first must decide whether an indentation is well-marked. It then must determine the proper measurement of the indentation's penetration and the proper measurement of the width of the indentation's mouth. It next must consider the proportion of the indentation's penetration to the width of its mouth. Finally, a court must decide whether the indentation contains "landlocked waters," and is a not a "mere curvature of the coast."

To apply the second sentence of the definition, a court must determine the total area of the indentation. A court next must determine the proper measurement of a line drawn across the mouth of the indentation. Finally, it must decide whether the area of the indentation exceeds the area of a semi-circle having a diameter equal to the line drawn across the mouth of the indentation. This report addresses each of these required

determinations in light of precedent and the resolution of various preliminary disagreements between the parties.

2. Precedent under Article 7(2)

The Court has addressed article 7(2) in several cases. Two of these cases contain little discussion of the elements of article 7(2) because the parties did not dispute its application. The United States and Massachusetts agreed that Nantucket Sound did not meet the requirements of a juridical bay under article 7(2). *See Maine (Nantucket Sound)*, 475 U.S. at 94. The parties similarly agreed that Long Island Sound and part of Block Island Sound would constitute a juridical bay if Long Island could be assimilated to the mainland. *See Rhode Island and New York Boundary Case*, 469 U.S. at 512.

In two other cases, the Court avoided applying article 7(2). In the *Alabama and Mississippi Boundary Case*, the Special Master concluded that Mississippi Sound met the requirements of article 7(2), after assimilating Dauphin Island to the mainland. *See* 470 U.S. at 100. The Court, however, did not reach this issue. It concluded that Mississippi Sound was a historic bay, and thus found it unnecessary to decide whether it also was a juridical bay. *See id.* at 101. Similarly, in *United States v. Florida*, Special Master Albert B. Maris concluded that an area of water in the vicinity of Cape Sable and Knight Key (designated as "Florida Bay") was a juridical bay. *See* Florida Report, *supra*, at 38-39. The Court, however, sent the issue back to Special Master Maris for consideration of additional arguments. *See United States v. Florida*, 420 U.S. 531, 533 (1975) (per curiam). The parties later settled, stipulating that no juridical bay existed. *See* Supplemental Report of Albert B. Maris, Special

Master at 3, *United States v. Florida* (Dec. 30, 1975) (No. 52, Orig.).

In *California*, 381 U.S. at 169-170, the Court held that Monterey Bay was a juridical bay under article 7(2), but that several other bodies of waters were not. These other bodies of waters included San Pedro Bay, San Luis Obispo Bay, Santa Monica Bay, and water located within segments of the coast from Point Conception to Point Hueneme and from the southern extremity of San Pedro Bay to the western headland at Newport Bay. *See id.* at 214, apps. A-D (Black, J., dissenting) (depicting these areas). The Court quoted article 7's requirements, and said without further elaboration: "Applying these tests to the segments of California's coast here in dispute, it appears that Monterey Bay is inland water . . . ." *Id.* at 169-170.

3. Preliminary Disagreements

In their briefs, the parties have disagreed about the meaning of several of article 7(2)'s requirements. These disagreements require resolution before applying article 7(2) to the waters at issue in this case.

a. Measurement of the Width of the Mouth

The first sentence of article 7(2), as noted above, requires a court to determine the proper measurement of the width of the indentation's mouth. *See* Convention, *supra*, at 7(2). Although measuring the width is not difficult when the mouth of an indentation is completely open, the parties strongly disagree about how to measure the width of the mouth when islands lie between the two mainland headlands. The United States argues that the Court should make a complete mainland headland to

mainland headland measurement, ignoring any islands between the headlands. *See* U.S. Count II Opposition at 33-34. Alaska, in contrast, argues for a measurement equal to the sum of the widths of actual openings from the bay to the sea. *See* Alaska Count II Memorandum at 31-32. Under this method, Alaska would subtract from the total mainland headland to mainland headland distance any space in the mouth taken up by islands.

The two methods of measuring the width of the mouth lead to very different results. For example, the United States says that the width of North Bay is the entire distance from Cape Spencer to Cape Decision, or approximately 154 nautical miles. *See* U.S. Count II Opposition at 42. In contrast, Alaska says that the width of North Bay is only 30.67 nautical miles because Baranof Island and Chichagof Island block much of the opening to the sea.[54] *See* Alaska Count II Memorandum at 31. This difference substantially affects the juridical bay analysis. The narrower the width of the mouth, the greater the proportion of the penetration to the width, and the easier to satisfy the requirements of article 7(2)'s first sentence.

The Special Master recommends that the Court adopt the position of the United States for three reasons. First, the text of article 7 better supports the United States' view. The first sentence of article 7(2) requires measurement of the width of

[54]This distance includes a measurement from Cape Ommaney on the southern tip of Baranof Island directly to Cape Decision on Kuiu Island. Alaska notes that an even smaller figure is possible by measuring from Cape Ommaney to Coronation Island and then from Coronation Island across the closely spaced Spanish Islands to Cape Decision. *See* Alaska Count II Memorandum at 31-32 n.17.

the indentation's mouth for the purpose of comparing the width to the penetration. Nothing in article 7 expressly says how to make this measurement when islands lie in the mouth. The second sentence of article 7(2) then requires measurement of a "line drawn across the mouth of that indentation" for the purpose of comparing the area of a semi-circle having the same diameter to the area of the indentation. In contrast to the lack of explicit guidance for the measurement in the first sentence, article 7 does contain express instructions on how to make the second measurement when islands lie in the mouth. Article 7(3) says:

> Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

Convention, *supra*, art. 7(3).

The reasonable implication is that article 7 contemplates that space taken up by islands will not be included when measuring a line across the mouth of an indentation under the second sentence of article 7(2), but will be included when measuring the width of the indentation for the first sentence of article 7(2). Otherwise, the drafters of article 7 would have had no reason to include a special rule in article 7(3).

Second, the limited precedent available tends to support the United States' interpretation of article 7(2). In the *Rhode Island and New York Boundary Case*, the Court briefly considered whether Long Island Sound would meet the requirements of a juridical bay if Long Island were treated as an island in the mouth of the bay as opposed to an extension of the mainland. Concluding that it would not, the Court said:

> Though the coast to the north of Long Island curves somewhat, it was the nearly unanimous conclusion of the testifying experts that, in the absence of Long Island, the curvature of the coast is no more than a "mere curvature" and is not an "indentation." And, absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked; neither would they satisfy the semicircle test.

Rhode Island and New York Boundary Case, 469 U.S. at 514-515.

In this passage, the Court does not say anything expressly about how to measure the width of the mouth of a bay for the purpose of the first sentence of article 7(2). Alaska therefore reads the quotation merely as emphasizing that "Long Island is all that encloses or surrounds the waters of the Sound." Alaska Count II Reply at 17. At bottom, however, the statement shows that the Court chose to ignore an island in the mouth of an indentation when determining whether the indentation's physical characteristics met the requirements of article 7(2)'s first sentence. This choice supports the United States' view that the width of the mouths of the alleged juridical bays should be measured from headland to headland, without regard to the presence of any islands.

In the *Louisiana Boundary Case*, the Court said that "lines across the various mouths are to be the baselines for all purposes." 394 U.S. at 55 (footnote omitted). Alaska contends that this statement supports its position. *See* Alaska Count II Memorandum at 33. The quotation, however, merely describes how to draw the closing lines of a bay having islands in its mouth after determining that the bay exists. The statement does

not indicate how to measure the width of an alleged bay's mouth when applying the first sentence of article 7(2) to determine whether a bay exists.

Third, adopting Alaska's interpretation would create a practical problem. The first sentence of article 7(2) requires a comparison of the "penetration" of an indentation to the width of its mouth. As explained immediately below, the penetration of an indentation must be measured starting from a point along the indentation's mouth. The United States correctly argues that an indentation having more than one mouth necessarily would have multiple penetrations, resulting in an ambiguous application of article 7(2). *See* U.S. Count II Opposition at 38. The United States' interpretation eliminates this problem because it ignores islands and treats indentations as though they have only one mouth for the purposes of measurement.

b. Measurement of the Penetration of Bay

In their briefs, the parties have discussed several alternative methods of measuring the penetration of an asserted juridical bay for the purpose of the first sentence of article 7(2). *See* Alaska Count II Memorandum at 36 n.19; U.S. Count II Opposition at 39-40. In the end, they purport to settle on what they each call the "longest straight line" method. Alaska says that the longest straight line method calculates the penetration as the distance from "any point on the closing line to the point of deepest penetration within the bay." Alaska Count II Memorandum at 36 n.19. The United States identifies the penetration as the distance "between any point on the mouth and the head of the waterbody in question." U.S. Count II Opposition at 39. Hodgson and Alexander's influential paper

on juridical bays also recommends using the longest straight line method to measure penetration. *See* Hodgson & Alexander, *supra*, at 8-9 & fig. 3. The Special Master therefore will employ this method.[55]

Despite their agreement on which test to use for measuring penetration, the parties dispute both where the longest straight line properly may start and where it may end. On the issue of

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[55]One aspect of the longest straight line method requires attention. If the longest straight line of penetration does not run exactly perpendicular to the mouth of the indentation, the line measures not only the indentation's penetration in the sense of how deeply the indentation cuts into the mainland but also to some extent the width of the indentation. To state this point more formally, if the longest line of penetration has a length of p and enters the indentation at angle a, then the distance perpendicularly into the indentation is not p but instead the smaller $p*\sin(a)$. This point deserves attention because Alaska's proposed penetration lines start near one end of the mouth of the indentations at issue and then run not only into the indentation but also across almost the entire width of the indentation. *See infra* Appendices J & L (depicting these lines). This method of drawing the longest straight line of penetration, although perhaps counter-intuitive, appears permissible. Hodgson and Alexander's influential paper includes an illustration that has essentially the same characteristics, and they appear to approve counting the entire length of the longest straight line of penetration." *See* Hodgson & Alexander, *supra*, at 9, fig. 3. The United States seeks to limit the angle of penetration by arguing that the line of penetration cannot run across the bay but must extend from the mouth of the bay to its "head." U.S. Count II Opposition at 42. The United States, however, offers no test for identifying the head of a bay.

where the longest straight line may begin, Alaska contends that it may start at the most distant entrance point leading into the bay. *See* Alaska Count II Reply at 24-25 n.9. The United States, in contrast, argues that the line must begin on a line drawn from headland to headland across the bay's mouth. *See* U.S. Count II Opposition at 43 n.19. This disagreement leads to substantially different results. For example, Alaska identifies a 124 nautical mile line starting at the entrance between Prince of Wales Island and Duke Island as the longest straight line of penetration for South Bay. *See infra* Appendix J (line connecting point marked "Ey" to point marked "Fy"). The United States objects to this line because it begins at a point seaward of the closing line across the mouth of South Bay, which runs between Cape Decision on Kuiu Island and Cape Fox on the Alaskan mainland. *See* U.S. Count II Opposition at 43 n.19. The United States identifies a shorter 75-nautical mile line as the longest straight line of penetration. *See infra* Appendix K.

Although neither side has cited authority for its position, the Special Master believes that the United States has the better view. When measuring the penetration of an indentation using the longest straight line method, the longest straight line must begin on the headland to headland line across the mouth of the bay. Although a bay may have entrance points that lie seaward of this line when islands lie in the mouth of the bay, the Special Master previously has concluded that islands should be ignored when measuring an indentation's physical characteristics for the purposes of article 7(2)'s first sentence. *See supra* part III.D.3.a.

On the issue of where the longest straight line may end, Alaska contends that it "should be drawn to the most inland

point." Alaska Count II Memorandum at 36 n.19. The United States, in contrast, says that the line may not enter "admittedly inland" waterways within the asserted bay. U.S. Count II Opposition at 42. For example, in its argument regarding North Bay, Alaska identifies the longest straight line of penetration as a 180-nautical mile line ending within a fiord called Lynn Canal. *See infra* Appendix L (line connecting point C to point D). The United States objects, contending that Alaska is measuring North Bay "plus Lynn Canal," and therefore exaggerating the penetration of North Bay. U.S. Count II Opposition at 42. The United States identifies a shorter 100-nautical mile line as the longest straight line of penetration into North Bay that does not enter any canals, ports, or sounds within the bay.[56] *See infra* Appendix M.

The United States' view has considerable logical appeal, but the United States has not cited any authority to support its position.[57] Alaska, in contrast, relies on the *Fisheries Case*

[56]Alaska argues that the United States gave "the measurement of the penetration of North Bay as approximately 130 nm" in an answer to an interrogatory from Alaska. Alaska Count II Memorandum at 36. This answer to the interrogatory was merely estimating the length of the "longest straight line from the mouth identified by Alaska." Defendant's Response to Plaintiff's First Set of Interrogatories at 21 (Exhibit AK-157). This answer does not preclude the United States from asserting that the longest straight line, properly drawn under its own criteria, extends only 100 nautical miles.

[57]Although not cited by the United States, the influential paper by Hodgson and Alexander addresses a similar topic. The authors say that the area of an asserted bay for the purpose of article 7(2)'s

(U.K. v. Norway), 1951 I.C.J. 116. *See* Alaska Count II Memorandum at 36 n.19. In the *Fisheries Case*, the International Court of Justice considered whether the Sværholthavet Basin of Norway constituted a juridical bay. *See* 1951 I.C.J. at 141. A complication in the case was that the Sværholt Peninsula lay in the middle of the basin, separating two lengthy fiords called Laksefjord and Porsangerfjord. *See* Exhibit US-II-9 (depicting this coast line). The United Kingdom argued that the "basin's penetration inland must stop at the tip of the Sværholt peninsula," making the penetration of the basin only 11.5 nautical miles. *Id.* The International Court of Justice, however, disagreed. It ruled:

> The fact that a peninsula juts out and forms two wide fjords, the Laksefjord and the Porsangerfjord, cannot deprive the basin of the character of a bay. It is the distances between the disputed baseline and the most inland point of these fjords, 50 and 75 sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth. The Court concludes that Sværholthavet has the character of a bay.

Id.

The Special Master recommends that the Court follow the *Fisheries Case* on this issue. Although the *Fisheries Case*

second sentence should not include "[r]ivers, lagoons, subsidiary bays, channels and the like." Hodgson & Alexander, *supra*, at 6. *See also id.* at 7, fig. 2 (illustrating this principle). The authors, however, do not say whether the same rule should apply when determining the penetration of the asserted bay.

predates the Convention, the International Court of Justice used nearly the same standards as those later embodied in the Convention. The Court has relied on the *Fisheries Case* with respect to coast line issues. *See Maine (Nantucket Sound)*, 475 U.S. at 99; *Alabama and Mississippi Boundary Case*, 470 U.S. at 102. In addition, the United States has made no attempt to distinguish the *Fisheries Case*. Accordingly, if a penetration line used for assessing whether the Sværholthavet Basin is a juridical bay may enter the Laksefjord or the Porsangerfjord, a similar penetration line used for assessing North Bay may enter the fiord called Lynn Canal.

c. Assessment of "Proportion"

Article 7(2) requires a court to consider the "proportion" of a bay's penetration to its width. The United States argues that the penetration must be at least as long as the width to form a juridical bay. *See* U.S. Count II Opposition at 40-41. The United States relies on two secondary sources to support its view. Hodgson and Alexander in their influential paper say that "true land-locked conditions should require that the opening (of the bay) be narrower than a principal lateral axis of the bay." Hodgson & Alexander, *supra*, at 8. In addition, a diagram from Mitchell P. Strohl, *The International Law of Bays* 57 (1963) (Exhibit AK-480), shows a model bay having a penetration equal to its width. Alaska disagrees, asserting that neither the Convention nor Court precedent requires a specific numeric proportion of depth to width. *See* Alaska Count II Reply at 24.

The Special Master agrees with Alaska based on the text of article 7(2) and on precedent. Article 7(2) easily could have specified that the penetration of a bay must exceed the width of

its mouth, but it does not. Accordingly, the Special Master concludes that the proportion of penetration to width is a factor to consider in deciding whether a body of water meets the requirements of article 7(2). The greater the proportion, the more the waterway resembles a bay, and vice versa. This determination admittedly lacks the certainty of a numerical test, but no more so than the question under article 7(2) of whether an indentation is "well-marked." *See Rhode Island and New York Boundary Case*, 469 U.S. at 520 (noting that some of the requirements of article 7(2) are "less mathematical" than others).

In *California*, the Court upheld Special Master Davis's conclusion that Monterey Bay is a juridical bay. *See California*, 381 U.S. 169-170. An appendix to Justice Black's dissent contains an illustration depicting Monterey Bay. *See id.* at 214, app. B (Black, J., dissenting). This illustration includes measurements showing that Monterey Bay has a penetration of only 9.2 nautical miles and a width of 19.24 nautical miles. *See id.* These figures suggest a ratio of penetration to width of 0.48. *See* Alaska Count II Reply at 24 (citing Monterey Bay as a counter-example to the United States' view on penetration). This suggested ratio, however, cannot serve as a benchmark for assessing the proportion of penetration to width of other bays. The maker of the illustration did not use the longest straight line method to measure the penetration of Monterey Bay but instead used the less generous "maximum perpendicular line" method. Using the longest straight line method, the penetration of Monterey Bay would appear to exceed the width of its mouth.

d. Meaning of "Landlocked"

The first sentence of article 7(2) requires the waters of a juridical bay to be "landlocked." The Court addressed this requirement at length in the *Rhode Island and New York Boundary Case*, 469 U.S. at 525. The Court said:

> The Convention does not define "landlocked," and this Court has not yet felt it appropriate to offer a comprehensive definition of the term. Scholars interpreting the Convention have given the term a subjective and common-sense meaning. We agree with the general proposition that the term "landlocked" "implies both that there shall be land in all but one direction and also that it should be close enough at all points to provide [a seaman] with shelter from all but that one direction." P. Beasley, Maritime Limits and Baselines: A Guide to Their Delineation, The Hydrographic Society, Special Publication No. 2, p. 13 (1978).

Id. (footnotes omitted, bracketed text in original). In a footnote following this passage, the Court quoted the following statement by Hodgson and Alexander:

> The concept of land-locked is imprecise and, as a result, may call for subjective judgments. . . . Basically, the character of the bay must lead to its being perceived as part of the land rather than of the sea. Or, conversely, the bay, in a practical sense, must be usefully sheltered and isolated from the sea. Isolation or detachment from the sea must be considered the key factor.

Id. at 525 n.19 (quotation marks omitted, ellipses in original) (quoting Hodgson & Alexander, *supra*, at 6, 8). In the *Louisiana Boundary Case*, the Court also said that an otherwise

landlocked indentation "surely would not lose that characteristic on account of an additional narrow opening to the sea." 394 U.S. at 61.

The parties disagree about one important issue with respect this definition. Alaska takes the position that non-assimilated islands may make waters landlocked by blocking them from the sea. *See* Alaska Count II Memorandum at 38. The United States, in contrast, argues that non-assimilated islands cannot make waters landlocked. *See* U.S. Count II Reply at 7-10. This dispute makes a difference in the case of North Bay. Alaska identifies the southern entrance point of North Bay as Cape Decision on Kuiu Island. *See infra* Appendix L. The United States, however, argues that much of the coast of Kuiu Island would face the open sea but for the presence of Baranof Island. *See* U.S. Count II Opposition at 41-42.

The United States has the correct view under the Court's precedent. In the *New York and Rhode Island Boundary Case*, the Court initially considered whether Long Island Sound would constitute a juridical bay if Long Island were not assimilated to the mainland. *See* 469 U.S. at 514-515. The Court concluded that it would not meet the requirements of article 7 for several reasons. *See id.* One of these reasons was that "absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked." *Id.* at 515. In this passage, the Court implicitly rejected the view, now expressed

by Alaska, that the presence of unassimilated islands between the open sea and the coast line can make waters landlocked.[58]

4. Application of Article 7(2)

Based on the Court's precedents, and the resolutions of the disagreements discussed above, North Bay and South Bay would not meet the requirements of a juridical bay, but Sitka Sound and Cordova Bay would meet them if assimilation of the necessary islands occurred. The following discussion explains these conclusions.

a. North Bay

Alaska and the United States agree that North Bay satisfies the semi-circle area test in the second sentence of article 7(2). According to Alaska, a line drawn across the mouth of North Bay in accordance with the rule in article 7(3) is 30.37 nautical miles long. The area of a semi-circle having a diameter of

[58]The Court stated: "A mere glance at a map of the region under consideration reveals that unless Long Island is considered to be part of the mainland and provides one of the headlands, neither Long Island Sound nor Block Island Sound satisfies the article 7 requirements for a bay. Though the [mainland] coast to the north of Long Island curves somewhat, it was the nearly unanimous conclusion of the testifying experts that, in the absence of Long Island, the curvature of the [mainland] coast is no more than a 'mere curvature' and is not an 'indentation.' And, absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked; neither would they satisfy the semicircle test." 469 U.S. at 514-515.

30.37 nautical miles is only 362.2 square nautical miles.[59] This area is far less than the area of North Bay, which Alaska measures as 5,592.86 square nautical miles. *See* Alaska Count II Memorandum at 41. The United States accepts this conclusion. *See* U.S. Count II Opposition at 33 n.14.

The parties, however, disagree about whether North Bay is a "well-marked indentation" as required by article 7(2). Although the Convention does not define this term, Alaska and the United States each have relied on the explanations of the term given by Westerman in her treatise on juridical bays. *See* Alaska Count II Memorandum at 29; U.S. Count II Memorandum at 19. Westerman initially points out that Article 7 does not require nations to indicate bay closing lines on their official charts. *See* Westerman, *supra*, at 83. She then explains that a bay must be well-marked by physical features so that a mariner looking at charts that do not show bay closing lines may perceive the limits of the bay and avoid making illegal entry into inland waters. *See id.* Westerman concludes that "*geo-*

[59]In its brief, Alaska calculates the area of a semicircle having a diameter of 30.37 nautical miles as 369.39 square nautical miles rather than 362.2 square nautical miles. *See* Alaska Count I Memorandum at 41. The area of a semicircle having a diameter D is $\pi(D/2)^2/2$, where π is a constant equal to approximately 3.14159. Using this formula, the area is 362.2 square nautical miles. The Special Master cannot explain the discrepancy in Alaska's calculation, but the difference is not significant. The Special Master agrees with Alaska's calculation of the area of a semicircle having a diameter equal to the width of the mouth of South Bay. *See infra* part III.D.4.b.

graphical obviousness" therefore must determine what is well-marked. *Id.* at 85 (emphasis in original). She says:

> It is this quality of geographical obviousness, i.e., the existence of a coastal indentation lying behind identifiable entrance points and having the general configuration of a bay, which is sufficient to put the mariner on notice and which, at last, lends content to the well-marked requirement of paragraph two, sentence one [of article 7].

Id.

Alaska argues that North Bay is a well-marked indentation under this definition. The State observes that North Bay generally has calm, protected waters. "Passing through the well-marked entrances to any of the asserted bays," Alaska says, "a mariner would reasonably expect that he is heading inland, to sheltered waters away from the sea." Alaska Count II Memorandum at 29. In addition, Alaska contends that North Bay has a clear bay-like shape when depicted with all non-assimilated islands removed. *See id.* at 30; Exhibit AK-149 (North Bay with Islands Removed).

The United States disagrees, asserting that North Bay is not visually recognizable as a bay. *See* U.S. Count II Reply at 6. "The juridical bays that Alaska seeks to create in this case," the United States says, "are not only impossible for mariners to identify, but they went undiscovered by numerous geographic experts and Alaska's own legal counsel until after the commencement of this quiet title suit." U.S. Count II Memorandum at 20. The United States notes that the early explorers in the region identified the waters of the Alexander Archipelago as "straits" and "passages" rather than as "bays." *See* U.S. Count II Reply at 6. It further observes that State Department Geographer S. Whittemore Boggs did not identify them in his extensive studies of the Alexander Archipelago. *See* U.S. Count II Memorandum at 20. In addition, the United States points out that the Coastline Committee did not recognize any of the asserted bays as juridical bays when it published charts of the area in 1971. *See id.* The United States further says that when Alaska objected to the Committee's conclusions in the 1970s, it argued that the Alexander Archipelago contained historic inland waters, but did not contend that the waters constituted juridical bays. *See id.* at 20-21.

The Special Master agrees to some extent with both parties. North Bay, as Alaska asserts, does have a bay-like shape when depicted without the numerous non-assimilated islands that lie within its waters. *Compare* AK-149 (graphic depicting North Bay with islands removed) *with* 381 U.S. at 214, app. B (Black, J., dissenting) (illustration of Monterey Bay). Yet, as the United States says, this bay-like shape is not obvious from a visual inspection of the area or by looking at actual charts of area. *See* Alexander Archipelago and Inside Passage (chartlet) (Exhibit US-II-6).

Resolution of the issue, accordingly, requires weighing the competing assertions of the parties. On balance, the Special Master believes that the United States has the stronger argument. In determining whether an area is a well-marked indentation for the purpose of article 7(2), if the standard is geographical obviousness, then actual charts of the area and the actual record of observation by experienced navigators and geographers must carry more weight than depictions having islands or other features removed. In addition, although North Bay undoubtedly contains sheltered water, sheltered water does not

necessarily prove the existence of a bay because straits also contain sheltered waters. Because of North Bay's great size, much of the shelter comes from the non-assimilated islands creating straits within its mouth and interior, rather than from its headlands. In many areas, the mainland itself is not "'close enough at all points to provide [a seaman] with shelter from all but . . . one direction.'" *Rhode Island and New York Boundary Case*, 469 U.S. at 525 (quoting P. Beasley, *Maritime Limits and Baselines: A Guide to their Delineation, the Hydrographic Society, Special Publication No. 2*, p. 13 (1978)) (bracketed text in original). The Special Master therefore concludes that North Bay is not a "well-marked indentation" as required by article 7(2). This conclusion, by itself, prevents recognition of North Bay as a juridical bay.

The United States also argues that, under the standards set forth in article 7, North Bay could not qualify as a juridical bay when Alaska became a state because the waters of North Bay touched the Canadian shore in 1959. *See* U.S. Count II Reply at 10. This argument rests on two legal propositions and one factual proposition. The first legal proposition is that a juridical bay cannot touch the coast line of more than one nation. This proposition, the United States says, follows from the first paragraph of article 7, which says: "This article relates only to bays the coasts of which belong to a single State." Convention, *supra*, at art. 7(1). Professor Westerman also explains: "This statement is unequivocal and is necessary in . . . order to prevent large bodies of water such as the Mediterranean or Baltic Seas from technically becoming juridical bays under Article 7." Westerman, *supra*, at 79 (footnotes omitted).

The second legal proposition is that Alaska's rights vested in 1959 when Alaska became a state. This proposition follows from the nature of Alaska's claim. As explained in part III.A., Alaska claims that title to the submerged lands lying behind the closing lines of North Bay, and the submerged lands extending three miles seaward of these closing lines, passed to Alaska at statehood under the equal footing doctrine and Submerged Lands Act. *See* Amended Complaint, *supra*, ¶ 38; Alaska Introduction and Background Brief at 6-7, 10. Alaska makes no claim of title based on developments subsequent to the time of statehood.

The factual proposition is that North Bay touched the Canadian coast in 1959. As noted in the analysis of count I above, *see supra* part II.D.5, the Grand Pacific Glacier retreated from 1911 to 1961 into Canada, causing the waters of Glacier Bay's Tarr Inlet to touch the Canadian coast. (Tarr Inlet no longer cuts so deeply into the mainland because the Grand Pacific Glacier has since advanced up to and beyond the Canada-United States border). *See* Molnia Corrections Report, *supra*, at 4. Accordingly, the United States asserts, North Bay was not a juridical bay in 1959 when Alaska became a state. *See* U.S. Count II Reply at 10.

Although this argument may have merit, the Special Master hesitates to rely on it for making a recommendation to the Court for two reasons. First, as with the similar argument that the United States made in count I, Alaska has not had a full opportunity to respond to the argument because the United

States first explicated the Tarr Inlet problem in its reply brief.[60] Second, resolution of the issue also does not matter, given the Special Master's conclusion that North Bay cannot be a juridical bay because it is not a "well-marked indentation" as required by Article 7(2). The Special Master has not required additional briefing because additional briefing would prolong the case with likely no effect on the outcome.[61]

The United States also raises two additional arguments against characterizing North Bay as a juridical bay, but these arguments are not persuasive. First, the United States argues that the proportion of penetration to width for North Bay would

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[60]The United States mentioned in its opening memorandum that Tarr Inlet touched the Canadian border "earlier this century" (apparently meaning earlier in the 20th century). *See* U.S. Count II Memorandum at 4 n.2. In making this statement, the United States was addressing the possibility that the Grand Pacific Glacier might again retreat at some time in the future. *See id.* The United States did not argue until its reply brief that the location of the Grand Pacific Glacier in 1959 prevented Alaska for acquiring title the submerged lands in North Bay. The United States and Alaska each briefly addressed the Tarr Inlet problem at oral argument. *See* Tr. Oral Arg. at 85-86 (Feb. 4, 2003) (argument of the United States); *id.* 93 (argument of Alaska).

[61]If the Court disagrees with the Special Master's recommendations and decides (1) that Kuiu Island, Kupreanof Island, Mitkof Island, and Dry Island can be assimilated to form a peninsula and (2) that North Bay is well-marked indentation, the Court should require briefing on the Tarr Inlet problem before deciding whether to grant summary judgment.

prevent recognition of North Bay as a juridical bay. *See* U.S. Count II Opposition at 42. The United States bases this contention on its calculation that North Bay would have a width of 154 nautical miles but a penetration of only 100 nautical miles. *See infra* Appendix M. The Special Master disagrees. Assuming Cape Decision is a proper headland, the longest straight line of penetration would extend 180 nautical miles. *See infra* Appendix L; *supra* parts III.D.3.b (explaining how the longest straight line of penetration in North Bay may enter Lynn Canal). A proportion of 180 nautical miles to 154 nautical miles would support the finding of a juridical bay under article 7(2). Second, the United States argues that North Bay, as Alaska initially described it, is not landlocked as required by Article 7(2). *See* U.S. Count II Opposition at 41-42. As previously explained, Alaska identifies the southern entrance point of North Bay as Cape Decision on Kuiu Island. This entrance point and much of Kuiu Island are not landlocked because they face the open sea. Although Baranof Islands lies between these two proposed entrances, the Special Master already has concluded that the presence of non-assimilated islands cannot make an area landlocked. *See supra* part II.D.3.d. The United States therefore is correct that Cape Decision cannot serve as an entrance point. Alaska, however, has identified an alternative point on Kuiu Island that satisfies the 45-degree test. *See* Alaska's Count II Reply at 19 n.6; Exhibit AK-477 (chart depicting closing line satisfying the 45-degree test). While this alternative point would make North Bay somewhat smaller in area, it would not appear to alter

substantially the width of its mouth, its penetration, or its satisfaction of the semi-circle test.[62]

In sum, the Special Master concludes that North Bay is not a juridical bay because North Bay is not a "well-marked indentation" as required by Article 7(2). The Special Master does not make a recommendation on this issue whether the Tarr Inlet problem independently would prevent North Bay from having the status of a juridical bay.

b. South Bay

South Bay satisfies the semi-circle area test under the second sentence of article 7(2). According to Alaska, a line drawn across the mouth of South Bay, under the principles in article 7(3), would be 47.49 nautical miles long. *See* Alaska Count II Memorandum at 41. The area of a semi-circle having this diameter is 885.65 square nautical miles. This area is far less than the total area of South Bay, which Alaska measures as 4,949.02 square nautical miles. *See id.* at 41-42. The United States agrees with this conclusion. *See* U.S. Count II Opposition at 33 n.14. The United States also appears to accept that the waters of South Bay are landlocked. *See id.* at 43-44 (not addressing this issue in assessing South Bay).

The parties, however, disagree about the application of the other parts of the definition of a bay in article 7(2). Alaska and the United States vigorously dispute whether South Bay is a "well-marked indentation." *See* Alaska Count II Memorandum

[62]The parties do not provide the exact measurements in their briefs.

at 29-31; U.S. Count II Reply at 6. On the issue, the parties advance the same arguments that they make with respect to North Bay. Alaska contends that mariners would recognize that South Bay contains sheltered waters and that South Bay has a bay-like shape when depicted with all non-assimilated islands removed. *See* Alaska Count II Memorandum at 29-30; Exhibit AK-150 (South Bay with Islands Removed). The United States contends that South Bay is not visually recognizable as a bay and that explorers and experienced geographers have not characterized it as a bay. *See* U.S. Count II Reply at 6.

The Special Master again sees some merit in the views of each party. As Alaska says, when depicted with its non-assimilated islands removed, South Bay does have the general shape of a bay. Yet, when viewed on an accurate chart of the area or from the perspective of a mariner, South Bay is not visually recognizable as a bay.

On balance, the Special Master concludes that the United States has the stronger argument. South Bay is not a well-marked indentation. In assessing geographic obviousness, accurate representations of the area, descriptions by mariners, and the long-standing views of geographers must count for more than depictions of the area with the islands removed. In addition, although South Bay contains sheltered waters, much of this shelter comes from non-assimilated islands rather than the mainland. These islands create straits in places far removed from the mainland. The Special Master therefore concludes that South Bay, like North Bay, is not a well-marked indentation.

Alaska and the United States also disagree about the width of South Bay's mouth, its penetration, and the resulting

proportion of the penetration to the width. Alaska says that the width of South Bay's mouth is 47.49 nautical miles. *See* Alaska Count II Memorandum at 36. The United States says that the width of the mouth is approximately 120 nautical miles. *See* U.S. Count II Opposition at 43. The Special Master agrees with the United States because the United States has measured the distance from mainland headland to mainland headland. *See supra* part III.D.3.a.

With respect to penetration, Alaska says that the longest straight line that can be drawn from the mouth of South Bay to the head is approximately 124 nautical miles. *See infra* Appendix J (line connecting point marked "Ey" to point marked "Fy"); Alaska Count II Memorandum at 36-37. The United States, in contrast, says that the longest straight line that can be constructed to the head of South Bay is approximately 75 nautical miles long. *See infra* Appendix K; U.S. Count II Opposition at 43. The Special Master concludes that Alaska's proposed line is improper because it does not start on the headland to headline line across the mouth. *See* part III.D.3.b. Accordingly, the Special Master will accept the United States' estimation as the more accurate. This estimation yields a ratio of penetration to width of 75-to-120, or 0.63-to-1, a rather low

ratio.[63] Based on these considerations, the Special Master concludes that South Bay also is not a juridical bay.

c. Cordova Bay

The parties agree that, if Dall Island is assimilated to Prince of Wales Island, Cordova Bay satisfies the requirements for a juridical bay under article 7(2). *See* Alaska Count II Memorandum at 47-48; U.S. Count II Opposition at 45. The Special Master concurs with this assessment. *See* Exhibit AK-172 (chart depicting Cordova Bay with semi-circle plotted).

d. Sitka Sound

The parties also agree that, if Kruzof Island, Partofshikof Island, and Baranof Island are assimilated, Sitka Sound satisfies the requirements for a juridical bay under article 7(2). *See* Alaska Count II Memorandum at 47-48; U.S. Count II Opposition at 44 (stating that Sitka Sound would satisfy the criteria for a juridical bay, but disagreeing about the exact location of its closing lines). The Special Master also concurs with this assessment. *See* Exhibit AK-171 (chart depicting Sitka Sound with semi-circle plotted).

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[63] Alaska has not alleged how long its line of penetration would be if the portion lying seaward of the headland to headland line were removed. The Special Master estimates that removing this portion of the 124 nautical mile line would make the remaining portion of the line approximately 95.5 nautical miles long. This estimation would yield a ratio of 95.5-to-120, or 0.8-to-1, still a low ratio.

5. Conclusion

If the Court accepts the Special Master's recommendation with respect to assimilation, it need not consider whether North Bay, South Bay, Sitka Sound, and Cordova Bay are juridical bays. Even if assimilation of all the islands is possible, only Cordova Bay and Sitka Sound would meet the requirements of article 7(2) for juridical bays. North Bay and South Bay would not. If the Court determines that any bays exist, further proceedings would be necessary for surveying and determining the exact closing lines of the bays. *See* Convention, *supra*, arts. 7(4), (5).

E. Conclusion

The Special Master recommends that the Court grant summary judgment to the United States on count II of Alaska's amended complaint, deny Alaska's motion for summary judgment on count II, and order that Alaska take nothing on this count.

IV. THE GLACIER BAY NATIONAL MONUMENT (Count IV)

In count IV of its Amended Complaint,[64] Alaska claims title to "all the lands underlying marine waters within the boundaries of Glacier Bay National Monument." Amended Complaint to Quiet Title, *supra*, ¶ 61. The United States has moved for summary judgment on this claim, arguing that the federal government retained title to these submerged lands at statehood. The Special Master recommends that the Court grant summary judgment to the United States.

A. Overview

In 1925, under authority granted by the Antiquities Act of 1906, 34 Stat. 225 (1906) (codified at 16 U.S.C. § 431 (2000)), President Calvin Coolidge issued a proclamation creating the Glacier Bay National Monument in the northern part of the Alexander Archipelago. *See* Proclamation No. 1733, 43 Stat. 1988 (1925) [hereinafter 1925 Proclamation]. The boundaries set forth in the 1925 Proclamation surrounded much of Glacier Bay and some nearby areas. *See* Appendix N (depicting these boundaries in thick red lines). In 1939, President Franklin D. Roosevelt expanded the Glacier Bay National Monument. *See* Proclamation No. 2330, 4 Fed. Reg. 1661 (Apr. 18, 1939)

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[64]This report addresses count III after count IV. *See infra* part V. The Special Master has considered these counts in reverse order because count III involves a disclaimer of title. The basis for this disclaimer becomes clearer after explication of the standards governing federal reservation and retention of submerged lands in connection with part IV.

[hereinafter 1939 Proclamation]. The enlarged boundaries encompassed more of the Glacier Bay, added some surrounding areas, and extended three nautical miles out to sea in the west. *See* Appendix N (depicting these boundaries with thin red lines). In 1955, President Dwight D. Eisenhower slightly altered the boundaries, excluding some land in the area of the town of Gustavus. *See* Proclamation No. 3089, 20 Fed. Reg. 2103 (Apr. 5, 1955) [hereinafter 1955 Proclamation]. In 1980, Congress expanded the boundaries and designated the area as the "Glacier Bay National Park" and "Glacier Bay National Preserve." *See* 16 U.S.C. § 410hh-1(1) (2000).

Alaska contends that it acquired title to the submerged lands within the boundaries of the Glacier Bay National Monument as they existed at the time of statehood in 1959. In making this claim, Alaska relies on the Equal Footing Doctrine and the Submerged Lands Act. The United States disagrees. It asserts that Congress expressly retained federal ownership of the submerged lands within the boundaries of the Glacier Bay National Monument in the Alaska Statehood Act, 72 Stat. 339. Title to these lands, in its view, therefore did not pass to the State under either the Equal Footing Doctrine or the Submerged Lands Act.

Only the United States has filed a written motion for summary judgment on count IV. The United States asserts that count IV raises no genuine issues regarding material facts. Alaska, in contrast, asserts the existence of material factual disputes about the degree to which excluding submerged lands from the Monument would undermine or defeat the Monument's purposes. *See* Alaska Count IV Opposition at 18, 20-22. Alaska said in its opposition brief that it would like the opportunity at trial to rebut evidence that the United States has offered. *See id.* at 21-22. At oral argument, however, Alaska moved for summary judgment on count IV in case the Court finds that the United States' proffered evidence is inadequate as a matter of law. *See* Tr. Oral Arg. at 156 (Feb. 3, 2003).

B. Analysis

The Court has recognized that Congress may prevent title to submerged lands from passing to a new state at statehood under either the Equal Footing Doctrine or the Submerged Lands Act. *See Alaska (Arctic Coast)*, 521 U.S. at 33-35. The Court, however, has described state ownership of submerged lands as an "essential attribute" of a state's sovereignty. *See id.* at 5. Accordingly, under the Equal Footing Doctrine, the Court begins with a "strong presumption" against interpreting federal legislation to defeat a state's acquisition of title. *Montana v. United States*, 450 U.S. 544, 552 (1981). The Court applies the same standard in deciding whether Congress averted passage of title to submerged lands to a state under the Submerged Lands Act. *See Alaska (Arctic Coast)*, 521 U.S. at 35-36.

The Court recently has decided four cases addressing title to submerged lands within the boundaries of federal reservations. *See Idaho v. United States*, 533 U.S. 262 (2001); *Alaska (Arctic Coast)*, 521 U.S. 1; *Montana*, 450 U.S. 544; *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987). In these cases, the Court has developed a "two-step test of congressional intent" to determine whether Congress prevented submerged lands from transferring to a state under the Equal Footing Doctrine or Submerged Lands Act. *Idaho*, 533 U.S. at 273. This two-step test is satisfied when (1) "an Executive reservation clearly

includes submerged lands," and (2) "Congress recognizes the reservation in a way that demonstrates an intent to defeat state title." *Id.* *See also Alaska (Arctic Coast)*, 521 U.S. at 45 (applying same two-step test). The parties agree that this two-step test governs the present case. *See* U.S. Count IV Memorandum at 35-36; Alaska Count IV Opposition at 2.

1. Inclusion of Submerged Lands

In determining whether "an Executive reservation clearly includes submerged lands," the Court considers two questions. The first question is "whether Congress was on notice that the Executive reservation included submerged lands." *Idaho*, 533 U.S. at 273-74 (citation omitted). The second question is whether "the purpose of the reservation would have been compromised if the submerged lands had passed to the State." *Id.* at 274 (citation omitted).

In *Montana*, 450 U.S. 544, the Court held that a reservation created for the Crow Tribe of Indians did not include the bed of the Big Horn, a river flowing through the reservation. The Court observed that the treaty creating the reservation did not refer to the riverbed expressly. *See id.* at 554. It further concluded that the federal government did not need to include the riverbed to accomplish its purposes in creating the reservation because fishing was not important to the Crow Tribe's diet or way of life. *See id.* at 556.

In *Utah Div. of State Lands*, 482 U.S. 193, the Court held that Utah acquired title to the bed of Utah Lake when Utah became a state. The United States Geological Survey had selected the lake as a reservoir site in 1889 pursuant to an 1888 Act that reserved selected lands as the property of the United

States and made them not subject to entry, settlement, or occupation. *See id.* at 199. The Court held that the 1888 Act's structure and history strongly suggested that Congress had no intention to defeat Utah's claim t the lake bed under the Equal Footing Doctrine upon entry into statehood. *See id.* at 208. The Court also held that the transfer of title of the lake bed to Utah would not prevent the Federal Government from subsequently developing a reservoir at the lake in any event. *See id.*

In *Alaska (Arctic Coast)*, the Court held that the National Petroleum Reserve Number 4 "necessarily embraced" submerged lands in the Arctic Ocean because the executive order creating the Reserve indicated that its boundary followed the ocean side of offshore islands. 521 U.S. at 38-39. It also reasoned that reserving the submerged lands was necessary to the purpose of the Reserve because the United States needed oil and gas deposits contained within the submerged lands. *Id.* at 39. The Court similarly concluded that the Arctic National Wildlife Range (now called the Arctic National Wildlife Refuge) embraced submerged lands in the Arctic Ocean because the document setting the boundaries of the Range expressly referred to underwater bars and reefs. *See id.* at 51. The Court also determined that reserving the submerged lands was necessary for purposes of the reservation, which included protecting the habitats of polar bears, seals, and whales. *See id.*

In *Idaho*, the State conceded that a reservation for the Coeur d'Alene Tribe of Indians included submerged lands lying beneath Lake Coeur d'Alene and the St. Joe River. *See* 533 U.S. at 274. The Court characterized this concession as "sound." *Id.* It observed that the executive order creating the reservation described its acreage in a way that necessarily

included the submerged lands. *Id.* at 267, 274. In addition, the Court explained that excluding the submerged lands would undermine the purposes of the reservation because the Coeur d'Alene Tribe, unlike the Crow Tribe, depended on fishing. *See id.* at 266, 274. Finally, the Court noted twice that the northern boundary of the reservation crossed Lake Coeur d'Alene. *See id.* at 266, 274. The court explained that the district court in the case had found this feature of the reservation to show an intent to reserve submerged lands because it contradicted "the usual practice of meandering a survey line along the mean high water mark."[65] *Id.* at 266 (quoting *United States v. Idaho*, 95 F. Supp. 2d 1094, 1108 (D. Idaho 1998)).

a. Notice to Congress of Inclusion

Under *Idaho*, the first question to consider is "whether Congress was on notice that the Executive reservation included submerged lands." *Id.* at 274-75. Unless Congress has reason to know that a reservation included submerged lands, it could not intend the reservation to prevent title of the submerged lands from passing to a state at statehood. The Special Master concludes that the text of the documents creating and expanding the Monument and their interpretation by the executive branch supplied notice to Congress that the Glacier Bay National Monument included the submerged lands within its boundaries.

[65] Although the State disputed the district court's reasoning on this point, the Court concluded that the dispute had little consequence given the reservation's acreage description and the State's concession. *See id.* at 266 n.2.

(1) *The 1925 Proclamation Creating the Monument.* The 1925 Proclamation specified the boundaries of the Monument as follows:

> Beginning at the most southerly point of North Marble Island in approximate latitude 58° 40' north and approximate longitude 136° 4' west as shown on Coast and Geodetic Survey chart No. 8306; Thence southeasterly to the most westerly point of the largest island at the entrance of Bear Track Cove in approximate latitude 58° 34' north and approximate longitude 135 degrees 56' west; thence following the mean high water of the southerly shore to the most easterly point of said island; thence east on a parallel of latitude to the crest of the divide between the waters of Bear Track Cove and Bartlett Cove; thence [through described uplands] . . . ; thence northeasterly to the most southerly point on the north shore of Geikie Inlet; thence northeasterly following the mean high water of this shore to the most easterly point of land at the entrance of Geikie Inlet, then southeasterly to the place of beginning, containing approximately 1,820 square miles.

1925 Proclamation, 43 Stat. at 1989. *See* Appendix N (depicting this boundary with a thick red line).

Three aspects of the 1925 Proclamation's text put Congress on notice that the Monument included submerged lands. First, the last clause of the boundary description says that the reservation contains "approximately 1,820 square miles." That figure represents the total area within the boundaries described, including both uplands and submerged lands. *See* John D. Coffman & Joseph S. Dixon, *Report on Glacier Bay National Park (Proposed), Alaska* 3 (1938) (Exhibit US-IV-9, at 10)

(calculating that the 1925 boundaries contained approximately 1,549 square miles of uplands and 271 square miles of water-covered areas).[66] Second, the boundary of the Monument crosses the waters of Glacier Bay instead of following Glacier Bay's shoreline. These two features make the Monument similar to the reservation at issue in *Idaho*. In *Idaho*, as described above, the Court accepted the State's concession that the Coeur d'Alene Tribe's reservation contained submerged lands. *See* 533 U.S. at 274. The Court said that the concession was sound because the stated acreage of the reservation necessarily included submerged lands and because the boundaries of the reservation crossed a lake. *See id.* at 266-67, 274. The Court noted the district court's finding that drawing the boundary across a body of water deviated from the customary practice of meandering the boundary along the mean high water mark. *See* 533 U.S. at 266, 274.

Third, as the boundary of the Monument crosses Glacier Bay, it bends in a few places. As a result, the Monument includes some islands, like North Marble Island, while excluding others, like Drake Island and Willoughby Island. In *Alaska*, the Court held that a boundary line drawn in a similar manner around islands off the Arctic Coast revealed an intent to include submerged lands within the boundary. *See Alaska (Arctic Coast)*, 521 U.S. at 38-39. Alaska suggests that the President merely wanted to include certain islands in the Monument, and not others, and did not intend to include submerged lands. *See*

[66] Alaska does not challenge the correctness of this determination. *See* Alaska Count IV Opposition at 11 (objecting only that Coffman and Dixon calculated it at a later date).

Alaska Count IV Opposition at 8-9. If that were true, however, the President could have identified the islands by name or by description without drawing the boundary line through the water. Presidential proclamations have used that more direct approach to include islands in other areas. *See, e.g.*, Proclamation No. 2564 (Aug. 4, 1942) (Exhibit US-IV-53) (enlarging the Katmai National Monument in Alaska by adding "all islands in Cook Inlet and Shelikof Strait in front of and within five miles of the Katmai National Monument").

Although the text of the 1925 Proclamation shows that the National Monument included submerged lands, Alaska contends that other documents reveal that the President had a contrary intent. *See* Alaska Count IV Opposition at 4. Alaska notes that a 1924 executive order temporarily withdrew certain territory in the area of Glacier Bay while the President studied the advisability of creating a National Monument. *See* Executive Order No. 3983 (Apr. 1, 1924) (Exhibit AK-346). The order described the withdrawn territory as "public lands." *Id.* Alaska contends that this order shows that the Monument does not include submerged lands because at the time submerged lands were not considered "public lands." *See* Alaska Count IV Opposition at 5.

This argument is not convincing. As the United States correctly observes, *see* U.S. Count IV Reply at 8, the 1925 Proclamation, unlike the 1924 executive order, does not describe the reserved area as "public lands." If anything, omitting this description from the 1925 Proclamation suggests that the President did not want to limit the reservation to public lands.

Alaska also cites letters written by organizations in support of the proposal to create the Glacier Bay National Monument. In some of these letters, these organizations used phrases like the "region surrounding Glacier Bay" to describe the area under consideration. *See, e.g.*, Ecological Society of America, *Recommendations submitted by the Ecological Society of America with Regard to the Establishment of a National Monument at Glacier Bay, Alaska* 2 (1924) (Exhibit AK-349). Alaska says that these phrases show that proponents of the monument did not intend the Monument to include submerged lands. *See* Alaska Count IV Opposition at 6. The Special Master disagrees. Even if the Court were to consider extrinsic evidence of this kind, the letters that Alaska cites are too general to aid in understanding the specific terms used in the 1925 Proclamation.

For the foregoing reasons, the Special Master concludes that Congress had notice that the 1925 Proclamation included submerged lands within the Glacier Bay National Monument.

(2) *The 1939 Proclamation Expanding the Monument.* In 1939, President Franklin D. Roosevelt expanded the Monument by proclamation. This proclamation described the expanded boundaries as follows:

> Beginning at the summit of Mount Fairweather, on the International Boundary line between Alaska and British Columbia; thence southeasterly along present southern boundary of Glacier Bay National Monument to the point of the divide between the waters of Glacier Bay and Lynn Canal where said divide is forked by the headwaters of Excursion Inlet; thence easterly and southeasterly along the divide between the waters of Excursion Inlet and

> Lynn Canal to a point in approximate latitude 58° 27' N., longitude 135° 18' W., where said divide meets a subsidiary divide between streams flowing into Excursion Inlet; thence westerly and northwesterly along said subsidiary divide to the east shore of Excursion Inlet; thence due west to the center of the principal channel of Excursion Inlet; thence southerly along the center of the principal channel of Excursion Inlet to its junction with the Icy Passage; thence westerly and southwesterly along the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean; thence northwesterly following the general contour of the coast at a distance of 3 nautical miles therefrom to a point due west of the mouth of Seaotter Creek; thence due east to the north bank of Seaotter Creek and easterly along the north bank of Seaotter Creek to its headwaters; thence in a straight line to the summit of Mount Fairweather, the place of beginning. Containing approximately 904,960 acres.

1939 Proclamation, 4 Fed. Reg. at 1661.

Two aspects of the 1939 Proclamation's text suggest the inclusion of submerged lands. First, the 1939 boundary line, like the 1925 boundary line, cuts across bodies of waters. The 1939 boundary line runs along "the principal channel of Excursion Inlet" and along "the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean." Second, the 1939 boundary also extends into the Pacific Ocean three nautical miles from the mainland coast. These features make the boundary line similar to the boundary line of the reservation at issue in *Idaho*. In that case, as

described above, the boundary line crossed a lake instead of meandering along its shores. *See* 533 U.S. at 266 & n.2, 274. To repeat, the Court cited this feature when it said that Idaho had made a sound concession that the reservation contained submerged lands. *See id.* at 274.

Alaska argues that the boundary line goes through the water merely to partition jurisdiction over islands between the Glacier Bay National Monument and the neighboring Tongass National Forest. *See* Alaska Count IV Opposition at 24. This argument is not convincing. As the United States points out, *see* U.S. Count IV Reply at 13, the boundary line runs through Excursion Inlet even though Excursion Inlet contains no island on its western shore. The line, moreover, would not need to run three miles off the Pacific coast for the purpose of allocating islands because no islands lie more than two miles from the coast. *See Alaska Atlas and Gazetteer*, *supra*, at 30 & 31 (showing Gulf of Alaska area of the Glacier Bay National Monument) (Exhibit US-IV-55).

Another aspect of the 1939 Proclamation's text, however, suggests that the President did not intend to include the submerged lands. The final clause of the 1939 Proclamation (which neither party has addressed in its written briefs) says that the addition to the Monument contains 904,960 acres. This figure, unlike the 1820 square mile figure stated in the 1925 Proclamation, includes only uplands and not submerged lands. *See* Theodore R. Catton, *Historical Report Relating to Claims to Submerged Lands in Glacier Bay National Park, Alaska* 36 (2001) (Exhibit US-IV-3). The total acreage within the boundaries of the addition, including submerged lands, would be 1,134,720 acres. *See id.* If acreage descriptions that include

submerged lands suggest that a reservation embraces submerged lands, *see Idaho*, 533 U.S. at 267, 274, then acreage descriptions that do not include submerged lands must have the opposite implication.[67]

The text of the 1939 Proclamation, accordingly, does not fully resolve the question whether the President intended to include submerged lands within the Monument. Looking to extrinsic evidence, the United States cites an internal executive report, made in preparation for the 1939 Proclamation. This report specifically said that the expanded Monument would contain submerged lands within its boundaries. *See* Coffman & Dixon, *supra*, at ii, 2 (Exhibit US-IV-9, pp. 4, 6). Using a source of this kind to show the meaning of a presidential proclamation is similar to using legislative history to prove the

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[67]One other point about the text of the 1939 Proclamation deserves mention. As described above in part IV.B.1.a.(1), Alaska argued that the 1925 Proclamation could not include submerged lands because, when the proposal to create the Monument was being studied in 1924, the term "public lands" did not include submerged lands. *See* Alaska Count IV Opposition at 5. The Special Master rejected that contention because the 1925 Proclamation does not describe the reserved area as "public lands." *See supra* part IV.B.1.a.(1). The 1939 Proclamation, in contrast, does use the term "public lands" to describe the area reserved in several places. *See infra* part IV.B.1.b.(5) (discussing the "whereas" clauses in the 1939 Proclamation). Alaska, however, does not cite the 1939 Proclamation's use of the term "public lands" as a reason for concluding that the 1939 expansion excluded submerged lands. *See* Alaska Count IV Opposition at 22-25.

meaning of a statute. It may show what the authors of the source wanted the proclamation to mean, but not much about its objective meaning. The report also may not have given Congress notice that the Monument contains submerged lands because Congress may not have seen the report when it enacted the Alaska Statehood Act.

More persuasive are sources showing that the executive branch interpreted the expanded National Monument to include submerged waters. In 1955, President Eisenhower removed a portion of the National Monument that the 1939 Proclamation had added. President Eisenhower's proclamation indicated that the eliminated area included "approximately 14,741 acres of land and 4,193 acres of water." 1955 Proclamation, 20 Fed. Reg. at 2103. This description reveals that the President interpreted the 1939 expansion to include submerged lands.[68]

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[68]The United States has endeavored to show that the National Park Service, which administered the National Monument, also interpreted the 1939 expansion of the Monument to include submerged lands. For example, an expert report reveals that the National Park Service studied the wildlife and fish of the marine submerged lands of the Monument. *See* Catton, *supra*, at 50-59. In addition, the National Park Service referred to the "waters" of the National Monument in various documents. For instance, in 1946, the National Park Service told the Commissioners of Indian Affairs that Alaska natives could hunt hair seals "in the waters of the national monument." Memorandum from Newton B. Drury, Acting Director National Park Service to Commissioner of Indian Affairs (May 14, 1946) (Exhibit US-IV-35). These sources add little to what the 1955 Proclamation by itself shows.

President Eisenhower's proclamation tips the balance in favor of the United States' position because the Court previously has given weight to executive interpretations of executive reservations. In *Idaho*, the Court noted that in the time between the creation of the reservation at issue and the admission of Idaho to the Union, the executive branch had construed the reservation to include submerged lands. *See Idaho*, 533 U.S. at 267 n.2. In *Udall v. Tallman*, 380 U.S. 1 (1965), the Court considered a challenge to the validity of oil and gas leases within the Kenai National Moose Range in Alaska. The proponents of the challenge argued that the Bureau of Land Management lacked authority to enter the leases. *See id.* at 3. The Court rejected the challenge. It observed that the executive order and a separate public land order did not expressly prohibit oil and gas leases and that the Secretary of the Interior, by issuing leases, consistently had construed the orders not to bar them. *See id.* at 4-5, 16-18. The Court said: "The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it." *Id.* at 4 (citing *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945), and other authority).

One other exhibit lends support to the United States' contention that the Glacier Bay National Monument includes submerged lands. In 1958, the Department of Interior published an atlas of Alaska. *See* Bureau of Land Management, U.S. Department of Interior, *Alaska: Federal Withdrawals and Reservations* (1958) (Exhibit US-IV-46 at 3). The atlas shows the boundary of the National Monument enclosing areas of water, just as the description of the boundary does in the 1925,

1939, and 1955 Proclamations. The atlas does not say explicitly that the Monument includes the submerged lands within the boundary. Indeed, the relevant page does not even label the boundary lines in a clear manner. However, as the United States points out, *see* U.S. Count IV Memorandum at 44, the Court previously relied on a similar graphic depiction from a different page of the same atlas when it determined that the Arctic National Wildlife Range contained submerged lands. *See Alaska (Arctic Coast)*, 521 U.S. at 56. The Court said: "By virtue of that submission [i.e., the atlas], Congress was on notice when it passed the Alaska Statehood Act that the Secretary of the Interior had construed his authority to withdraw or reserve lands, delegated by the President, . . . to reach submerged lands." *Id.* The same reasoning supports the conclusion that the atlas graphically depicted for Congress the full extent of the Glacier Bay National Monument, including its submerged lands.

b. Purposes of the Reservation

The second consideration in deciding whether the reservation of the Glacier Bay National Monument included submerged lands is the effect of excluding submerged lands on the purpose of the Monument. *See Idaho*, 533 U.S. at 274. The Special Master concludes that the purposes of creating the Monument included studying tidewater glaciers, protecting remnants of ancient inter-glacial forests, and protecting wildlife, and that excluding submerged lands would compromise or undermine these purposes.

(1) *Applicable Standard.* The parties initially disagree about the applicable standard for judging how the exclusion of

submerged lands would affect the purposes of the Monument. According to the United States, the Court must determine whether excluding the submerged lands from the Monument would "compromise" or "undermine" the purposes of the Monument. U.S. Count IV Memorandum at 30. Alaska articulates a higher standard, arguing that the Court must decide whether denying the United States title to the submerged lands "would *entirely defeat* a primary purpose of the reservation." Alaska Count IV Opposition at 12 (emphasis in original).

Precedent supports the view of the United States. As indicated previously, the Court said in its recent *Idaho* decision that it considers "whether the purpose of the reservation *would have been compromised* if the submerged lands had passed to the State." *Id.* at 274 (emphasis added, citation omitted). Elaborating, the Court said: "Where the purpose *would have been undermined*, . . . '[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area.'" *Id.* (emphasis added) (quoting *Alaska (Arctic Coast)*, 521 U.S. at 39-40). The Court in *Idaho* thus used the words "compromise" and "undermine," and not "entirely defeat," to describe the applicable test. These words indicate that the Court looks for an impairment of the purposes of the Monument, not a complete thwarting of them.

For example, in *Alaska (Arctic Coast)*, exclusion of submerged lands from the National Petroleum Reserve would have undermined, but would not have entirely defeated, the purpose of the Reserve. The Court said that the purpose was to secure a supply of oil for the Navy. *See* 521 U.S. at 39. The Court recognized that eliminating federal ownership of submerged lands within the Reserve's boundaries would deprive the United

States of oil and gas underlying those lands. *See id.* But eliminating federal ownership of the submerged lands would not have deprived the United States of all of the oil and gas within the entire Reserve because some of the oil was located underneath uplands within the Reserve. *See* Alaska Report, *supra*, at 422. Allowing Alaska to take title to the submerged lands therefore would have compromised the goal of securing a supply of oil for the Navy because it would have reduced the total supply, but it would not have entirely thwarted that goal because some oil and gas would have remained within the Reserve.

For its contrary view, Alaska relies on *United States v. New Mexico*, 438 U.S. 696 (1978). *See* Alaska Count IV Opposition at 13. The question in that case was what quantity of water, if any, the United States had reserved out of the Rio Mimbres when it set aside the Gila National Forest. *See* 438 U.S. at 698. The Court held that the United States had reserved the right to divert enough water to preserve the timber in the forest, but that the United States did not have a right to divert water for aesthetic, recreational, and certain other purposes. *See id.* at 698, 718. The Court's opinion summarized precedents in which the United States had claimed water rights in connection with a federal land reservation. In the summary, the Court observed that it previously had upheld the United States' claims only when it had "concluded that without the water the purposes of the [land] reservation would be *entirely defeated*." *Id.* at 700 (emphasis added) (footnote omitted). Alaska relies on this statement in arguing that the United States could retain submerged lands within the Glacier Bay National Monument only

if the purpose of the Monument would be "entirely defeated" without the submerged lands.

The Court's decision in *New Mexico* does not govern the present case. In *New Mexico*, the Court was considering the extent to which the United States had reserved the right to divert water from a river. This case concerns the issue whether the United States retained title to submerged lands. These inquiries involve separate considerations, and the Court has devised a distinct test for each of them. This case is governed by the *Idaho* and *Alaska* submerged land cases. These cases require the Court to consider whether excluding federal ownership of submerged lands would "undermine" or "compromise" the purposes of a federal reservation, not whether it would "entirely defeat" those purposes.

(2) *Purpose of Studying Glaciers (1925 Proclamation).* The 1925 Proclamation uses several "whereas" clauses to identify the factors leading to its creation. These clauses say:

> Whereas, There are around Glacier Bay on the southeast coast of Alaska a number of tidewater glaciers of the first rank in a magnificent setting of lofty peaks, and more accessible to ordinary travel than other similar regions of Alaska,
>
> And Whereas, The region is said by the Ecological Society of America to contain a great variety of forest covering consisting of mature areas, bodies of youthful trees which have become established since the retreat of the ice which should be preserved in absolutely natural condition, and great stretches now bare that will become forested in the course of the next century,

> And Whereas, This area presents a unique opportunity for the scientific study of glacial behavior and of resulting movements and development of flora and fauna and of certain valuable relics of ancient interglacial forests,
>
> And Whereas, The area is also of historic interest having been visited by explorers and scientists since the early voyages of Vancouver in 1794, who have left valuable records of such visits and explorations.

1925 Proclamation, 43 Stat. at 1988-89.

The third "whereas" clause of the 1925 Proclamation reveals that one purpose of creating the Glacier Bay National Monument was to provide "opportunity for the scientific study of glacial behavior." *Id.* A glacier is a "mixture of ice and rock that moves downhill over a bed of solid rock or sediment under the influence of gravity." Bruce F. Molnia, *The State of Glacier Science and its Relationship to the Submerged Lands Adjacent to and Beneath the Tidewater Glaciers of Glacier Bay at the Time of the Founding and Expansion of the Glacier Bay National Monument, Alaska* 6 (2001) (Exhibit US-IV-4) [hereinafter Molnia Glacier Report]. As the Proclamation indicates, Glacier Bay contains magnificent "tidewater" glaciers. A tidewater glacier is a glacier that terminates in the sea. *See id.* at 7.

A tidewater glacier has various scientifically interesting behaviors. One is that the terminal cliff of a tidewater glacier from time to time drops (or "calves") large blocks of ice into the sea. *See* Dennis Trabant, *Expert Witness Report for Glaciology Relating to Claims to Submerged Lands in Glacier Bay, Alaska* 5 (2001) (Exhibit US-IV-5). Another is that tidewater glaciers change in length over time. The advance or

retreat (i.e., lengthening or shortening) of the glacier may occur rapidly. In the Glacier Bay area, the Grand Pacific Glacier advanced 1.2 kilometers seaward through a fiord in 1912 and 1913, *see* Trabant, *supra*, at 4, and the Bering Glacier retreated landward 2.6 kilometers between 1977 and 1978, *see* Molnia Glacier Report, *supra*, at 9.

The United States argues that excluding submerged lands from the reservation would compromise scientific study of the behavior of Glacier Bay's tidewater glaciers. *See* U.S. Count IV Memorandum at 30-31. Its expert witness, Dennis C. Trabant, has declared: "The complete glacier system includes the mountain peaks as well as the ocean depths. Scientific study requires continuing access to the Glacier Bay laboratory as a whole." Trabant, *supra*, at 6. He further has declared: "Glacier Bay would not be an effective area for the study of tidewater glaciers if the submerged lands were excluded." *Id.* at 7.

These conclusions clearly have a foundation. Researchers commonly used vessels to study tidewater glaciers before creation of the Monument. *See* Molnia Glacier Report, *supra*, at 19-27. Without title to submerged lands in front of the tidewater glaciers, the United States argues that it could not authorize studies involving long-term mooring of vessels. *See* U.S. Count IV Reply at 10. The advance and retreat of tidewater glaciers depends on the physical characteristic of the glacial bed and the submerged fiord bottoms. *See* Trabant, *supra*, at 6; Molnia Glacier Report, *supra*, at 9, 37. The United States also contends that without title to the submerged lands it could not authorize the taking of core samples from the submerged lands

to determine their characteristics. *See* U.S. Count IV Reply at 10. The Special Master agrees with these contentions.

Alaska objects that the United States has not shown that the "framers of the [1925] proclamation had ever thought of studying the bottom of the bay, or that this study would be impossible unless the bay bottom were reserved." Alaska Count IV Opposition at 16. This objection lacks merit for two reasons. First, the subjective thoughts of the proponents of a reservation should not define the reservation's purpose when the documents creating the reservation state the purpose expressly.[69] The term "scientific study of glacial behavior" is broad enough to cover the kind of scientific research that the United States describes, regardless of whether anyone actually envisioned it in 1925. Second, contrary to what Alaska says, researchers do in fact appear to have studied the effects of glaciers on submerged areas prior to 1925.[70]

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[69]In addition, Alaska's contentions regarding the reservation's proponents are based on questionable evidence. Alaska submits, for example, that the boundaries of the Monument proposed by the Ecological Society "did not include the bay." Alaska Count IV Opposition at 17 n.2 (citing Ecological Society of America, *supra*, at 14). The cited boundary description, however, although not giving a southern boundary, includes the bay as much as it includes anything else. *See* Ecological Society of America, *supra*, at 14.

[70]For example, the 1914 study of Alaskan glaciers by R.S. Tarr and Lawrence Martin contains a section entitled "Glacier Sculpture Below Sea Level," in which the authors review soundings taken by earlier researchers and conclude: "The great depth below sea level, the form of the submerged topography, and the departures from

Alaska also contends that the Court cannot grant summary judgment because the parties dispute the degree to which excluding submerged lands from the Monument would impair the purpose of studying glaciers. *See* Alaska Count IV Opposition at 18. In Alaska's view, excluding submerged lands would have only "attenuated effects," which it considers "plainly insufficient." *Id.* Alaska says that, at trial, it would rebut the United States' evidence through cross-examination of witnesses and presentation of its own evidence. *See id.*

This contention lacks merit. The party opposing a motion for summary judgment "may not rest upon . . . mere allegations or denials." Fed. R. Civ. P. 56(e). On the contrary, the opposing party's "response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.* Despite substantial discovery and

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normal slopes, etc., are all explained satisfactorily by glacial erosion, which seems to have completely erased the structural or stream-carved-and-submerged pre-glacial topography." *See* Molnia Glacier Report, *supra*, at 14 (quoting Tarr and Martin study). Tarr and Martin also investigated the question of whether the glaciers are floating or grounded. Their study notes: "The soundings made in 1910 also establish the fact that, deep as the water is, it is practically impossible that any of the glacier fronts of Disenchantment Bay and Russell Fiord are floating now and they do not seem to have been afloat at any stage of their expansion, judging by the depths of the water. This means that there was always active glacial grinding on the fiord bottom and the problem arises as to where this eroded material is now. . . . Some . . . doubtless remains in the fiord bottoms . . . ." *Id.*

ample time for preparation, Alaska has not presented any affidavit, expert report, or other evidence contradicting the statements by Trabant that excluding submerged lands from the Monument would compromise effective scientific study. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-326 (1986) ("Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . .").

Indeed, at oral argument, when specifically asked what further evidence the State might present at trial, counsel for Alaska said, "it is not that there are facts that the State needs to come forward with, but that there's been a failure of proof on the United States' part." Tr. of Oral Arg. 155 (Feb. 3, 2003). Summary judgment thus would not deprive the State of the opportunity to present additional evidence. The State's contention is that the evidence presented by the United States fails to establish that the purposes of the Monument would be undermined if it did not include submerged lands. *See id.* at 155-56. Although "no defense is required by Rule 56(e) if the movant fails to meet the burden of showing the absence of any genuine issue of material fact," 10B Charles Allen Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2739 (3d ed. 1998) (footnote omitted), the evidence in this case sufficiently demonstrates that the purpose of studying glaciers would be

undermined if the Monument did not include submerged lands.[71]

(3) *Purpose of Studying Remnants of Inter-glacial Forests (1925 Proclamation).* The third "whereas" clause of the 1925 Proclamation also identifies the study of "valuable relics of ancient interglacial forests" as another purpose of creating the Monument. 1925 Proclamation, 43 Stat. at 1988. The retreat of some glaciers in the Glacier Bay area during the 19th and early 20th century revealed remnants of ancient trees that had been buried underneath ice for millennia. *See* Molnia Glacier Report, *supra*, at 3-4. Scientists hypothesize that these remnants came from forests that grew 2000 to 8000 years ago and were destroyed and covered by the advance of glaciers. *See id.* Some of the remnants sit upon the shores of fiords, but others rest on submerged lands. *See id.* The United States therefore argues that excluding submerged lands from the Monument would compromise the protection and study of these ancient forest remnants. *See* U.S. Count IV Memorandum at 31-32.

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[71] Alaska's contention that the United States' evidence is insufficient is tied to its incorrect assertion with regard to the substantive standard. *See* Alaska Count IV Opposition at 17-18 (asserting that "the United States has plainly failed to carry its burden of demonstrating that the purpose of studying [glacial] behavior would be 'entirely defeated' without including the bay bottom"). As noted earlier, the correct standard is whether exclusion of the submerged lands would compromise or undermine the purposes of the reservation, not whether it would entirely defeat those purposes. The evidence submitted by the United States suffices under the correct substantive standard.

Alaska raises two objections. First, Alaska says that interglacial forest relics occupy just a few sites comprising a tiny fraction of the submerged lands within the Glacier Bay. *See* Alaska Count IV Opposition at 19. The State contends that the United States does not need to reserve all of the submerged lands in Glacier Bay just to protect these areas. Even if what Alaska says is true, the Court should give little weight to this consideration. The Court previously has not second-guessed the extent of the submerged lands reserved by the United States once it has determined that exclusion of title would undermine a purpose of a reservation. For example, in *Alaska (Arctic Coast)*, the Court held that the United States had retained title to all of the submerged lands in the National Petroleum Reserve, not just submerged lands containing oil and gas. *See* 521 U.S. at 40-41. Indeed, if the Court had to determine, acre by acre, which submerged lands were important to the purposes of a reservation, and which were not, deciding submerged lands cases would become almost impossible.

Second, Alaska argues that the United States could study and protect the ancient forest remnants even if it did not have title to the submerged lands on which they lie. *See* Alaska Count IV Opposition at 19. This argument is not persuasive. Alaska unsuccessfully made an almost identical argument in connection with the Arctic National Wildlife Range. Alaska asserted that the United States could protect wildlife using waters within the Range even it did not have title to the submerged lands. *See* Alaska Report, *supra*, at 497-98. Special Master Mann rejected this line of argument on grounds that there might be a need to prevent adverse effects on the submerged lands. *See id.* at 498. He further asserted that the Submerged Lands Act did not

contemplate separating title to submerged lands from resources connected with the land. *See id.* The Special Master agrees with Special Master Mann's reasoning.

(4) *Purpose of Studying and Protecting Wildlife (1925 Proclamation).* Two portions of the 1925 Proclamation indicate that a third purpose of creating the Monument was to study and protect wildlife. The third "whereas" clause refers to the study of how glaciers affect the "movements and development of flora and fauna." 1925 Proclamation, 43 Stat. at 1988. In addition, the final portion of the Proclamation says:

> The Director of the National Park Service, under the direction of the Secretary of the Interior shall have the supervision, management, and control of the Glacier Bay National Monument, as provided in the act of Congress entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916 (39 Stat., 535), as amended June 2, 1920 (41 Stat., 732)."

Id. The Act of August 25, 1916, cited in the Proclamation, established the National Park Service and addressed national monuments and other reservations. *See* 16 U.S.C. § 1 (2000) (present codification). The Act requires the National Park Service to administer national monuments "by such means and measures as conform to the fundamental purpose of the said . . . monuments . . . *which purpose is to conserve . . . the wild life therein.*" *Id.* (emphasis added). The Act thus identifies protecting wildlife as a fundamental purpose of all National Monuments that contain wildlife.

The United States argues that excluding submerged lands from the Monument would undermine the protection of wildlife. *See* U.S. Count IV Memorandum at 32. Although

many different animals live within the boundaries of the Glacier Bay National Monument, the United States focuses on the brown bear. The report of expert Victor G. Barnes Jr. says that brown bears eat barnacles and rye and sedge grasses on tidelands and swim to islands to gather seabird eggs. *See* Victor G. Barnes, Jr., *Brown Bear Use of Marine Habitats in Alaska with Emphasis on Glacier Bay* 6-12 (2002) (Exhibit US-IV-6) [hereinafter Barnes Report]. It also says that brown bears have customarily been hunted from vessels. *See id.* at 13. The report concludes that, if protecting brown bears was a purpose of the Monument, "it would have been necessary to protect both the intertidal habitat and an adjacent zone of nearshore marine water." *Id.* at 19.

Alaska objects on three grounds. First, Alaska argues "protecting, rather than studying, the wildlife was never enunciated as a purpose of the reservation." Alaska Count IV Opposition at 21. This objection ignores the reference in the 1925 Proclamation to the 1916 Act, which identifies "conserving" wildlife as a primary purpose of National Monuments. *See* 16 U.S.C. § 1. In addition, as the United States points out, *see* U.S. Count IV Reply at 14, the study of fauna logically requires its preservation at least to some degree.

Second, Alaska also says that the United States could offer protection to animals even if it did not retain title to the submerged lands. *See* Alaska Count IV Opposition at 21. Alaska, as noted, unsuccessfully made a similar contention in connection with wildlife in the Arctic National Wildlife Range. *See* Alaska Report, *supra*, at 497-98. Special Master Mann persuasively concluded that even if a surface right for wildlife management would suffice to protect the United States' interest,

the Submerged Lands Act does not contemplate separating the rights needed for wildlife management from ownership of lands, including submerged lands. *See id.* at 498.

Third, Alaska says that it disputes the degree to which excluding submerged lands would defeat the purpose of studying or protecting wildlife. It asserts the need for a trial so that it may refute the United States' evidence by cross-examination or otherwise. *See* Alaska Count IV Opposition at 22. This argument lacks merit. As explained previously, a party opposing summary judgment must proffer contrary evidence. *See* Fed. R. Civ. P. 56(e). Alaska has not presented any affidavit, expert report, or other evidence contesting the conclusion of the United States' expert that protection of the brown bear requires protection of submerged lands.

(5) *Purposes of the 1939 Proclamation.* A procedural issue complicates determination of the purposes of the 1939 enlargement of the Glacier Bay National Monument. Alaska averred in its complaint: "The primary purposes of the 1939 expansion of Glacier Bay National Monument were to set aside a refuge for brown bears and to preserve a coastal forest." Amended Complaint, *supra*, ¶ 57. In its Opposition Brief, however, Alaska retreats from this assertion. It says that creating a refuge for brown bears "was in fact not a true purpose of the 1939 expansion. Rather, it was a political strategy that the Park Service abandoned when it no longer served its interests." *See* Alaska Count IV Opposition at 23. The United States objects to this argument on grounds that Alaska has not sought leave to amend the contrary allegations in its complaint. *See* U.S. Count IV Reply at 14-15.

In federal district courts, factual assertions in pleadings, unless amended, are judicial admissions that conclusively bind the party who made them. *See American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988); *White v. ARCO/Polymers Inc.*, 720 F.2d 1391, 1396 (5th Cir.1983); 30B Wright & Miller, *supra*, § 7026 & n.2 (interim ed. 2000). The Special Master, however, recommends that the Court not hold Alaska to what it said in its complaint regarding the purpose of the 1939 Proclamation for three reasons. First, determination of the purpose of a presidential proclamation largely turns on a legal analysis of the proclamation's text and context rather than on facts capable of admission by a party. Second, the Court may relax procedural rules in original jurisdiction cases. *See* Sup. Ct. R. 17.2 (providing that the Federal Rules of Civil Procedure serve only "as guides" in original jurisdiction cases). Third, the United States will not suffer prejudice because it has addressed the purpose of the 1939 Proclamation in its briefs notwithstanding the averment in Alaska's complaint. *See* U.S. Count IV Memorandum at 15-19, 33-34; U.S. Count IV Reply at 14-16.

The 1939 Proclamation, like the 1925 Proclamation, contains a number of "whereas" clauses identifying the factors leading to the enlargement of the National Monument. These clauses say:

> WHEREAS it appears that certain public lands, part of which are within the Tongass National Forest, adjacent to the Glacier Bay National Monument, Alaska, have situated thereon glaciers and geologic features of scientific interest; and

> WHEREAS a portion of the aforesaid public lands contiguous to the said monument are necessary for the proper care, management, and protection of the objects of scientific interest situated on the lands included within the said monument; and
>
> WHEREAS it appears that it would be in the public interest to reserve all of the aforesaid public lands as part of the said monument:

1939 Proclamation, 4 Fed. Reg. at 1661. The 1939 Proclamation, like the 1925 Proclamation, also instructed the National Park Service to administer the enlarged monument under the "Act of August 25, 1916, 39 Stat. 535 (U.S.C., title 16, secs. 1 and 2)." *Id.*

The second "whereas" clause of the 1939 Proclamation declares that the expansion of the Monument was to serve the purpose of furthering the "proper care, management, and protection of the objects of scientific interest" in the Monument. The 1925 Proclamation, as explained above, identified these "objects of scientific interest" as the tidewater glaciers, remnants of ancient forests, and flora and fauna. The enlarged Monument, like all National Monuments, by statute also serves the purpose of conserving wildlife. *See* 16 U.S.C. § 1. Just as excluding submerged lands would undermine the purpose of the 1925 Proclamation, so also would they undermine the purposes of the 1939 Proclamation.

In the Special Master's view, the subject of the purpose of the Monument requires no further analysis to satisfy the *Idaho* inquiry. The United States, however, seeks to bolster the foregoing conclusions with extrinsic evidence of what it calls the "administrative history" of the 1939 Proclamation. The

United States asserts that this administrative history demonstrates that the 1939 Proclamation's primary purpose was to create a habitat for brown bears. The Special Master will address this contention because the United States and Alaska each have devoted considerable attention to it in their briefs. *See* U.S. Count IV Memorandum at 15-19, 33-34; Alaska Count IV Opposition at 23, 27-42.

The documents presented by the United States show the following chronology of events. In 1927, E. W. Wilson, Chief of the Biological Survey, suggested expanding the Monument to provide a reserve for brown bears. *See* Letter from A.E. Demaray, Acting Director, National Park Service to Harold Ickes, Secretary, U.S. Dep't of Interior, at 1 (Sept 2, 1938) (describing Wilson's proposal) (Exhibit US-IV-17). Various reports and hearings followed.[72] In 1934, President

[72] In 1931, the Senate Special Committee on Conservation of Wild Life Resources submitted a report to Congress recommending "adding to the national monument some of the forest area along the gulf coast and to the south and to the southeast perhaps as far as the Lynn Canal westward to Mount St. Elias, *which would protect a certain number of large brown bears* . . . ." 1 National Resources Committee, *Regional Planning–Part VII Alaska: Its Resources and Development* 253 (1937) (Exhibit US-IV-19) (quoting the Senate Committee's report) (emphasis added).

In 1932, H.W. Terhune of the Department of Agriculture's Biological Survey testified to the Special Committee that he endorsed the possibility of enlarging Glacier Bay as a "bear sanctuary." Special Committee on Conservation of Wild Life Resources, United States Senate, *Hearing on the Protection and Preservation of*

Franklin D. Roosevelt wrote a memorandum to Secretary of Interior Harold Ickes expressing concern about a report that hunters were shooting bears from yachts in Alaska. *See* Barnes Report, *supra*, at 16 (describing this correspondence). Ickes responded that a proclamation for enlarging the Glacier Bay National Monument for the purpose of protecting brown bears

the Brown and Grizzly Bears of Alaska 32 (Jan. 18, 1932) (Exhibit US-IV-15). In addition, Field Naturalist Joseph Dixon of the National Park Service prepared a report on the proposed expansion of the Monument. This report expressed concern about brown bears being killed outside the original Monument boundaries. *See* John M. Kauffmann, *Glacier Bay National Monument, Alaska: A History of its Boundaries* 19 (1954) (quoting Dixon's report) (Exhibit US-IV-7).

Also in 1932, the Governor of the Territory of Alaska and the District Forester advocated that the "Glacier Bay National Monument be increased in size in order to make a suitable reserve for brown bear . . . ." Notes on Proposed Glacier Bay National Park (Exhibit US-IV-20, p. 19236). Senator Walcott, Chairman of the Senate Special Committee for Conservation of Wild Life Resources, also wrote to the Director of the National Park Service advocating an expansion of the Monument for the purpose of protecting the brown bear. *See* Letter from Senator Frederic C. Walcott to Horace M. Albright, Director, National Park Service (Mar. 18, 1932) (Exhibit US-IV-21). In addition, the Director of the National Park Service informed Representative Milton W. Shreve that the Park Service was considering expansion of the Glacier Bay National Monument for the purpose of protecting brown bears. *See* Letter from Director, National Park Service, to Rep. Milton W. Shreve (Mar. 24, 1932) (Exhibit US-IV-22).

was under consideration. *Id.* After further study,[73] the President issued the 1939 Proclamation.

The National Park Service issued a press release announcing the President's Proclamation. The press release declared: "Inclusion of the coastal area in the monument provides a natural feeding ground for wildlife that will find sanctuary there. The Alaska brown bear is the most common species in the monument and is in most need of protection, being the bear most sought by hunters." U.S. Dep't of the Interior, *Memorandum for the Press* 2 (Apr. 25, 1939) (Exhibit US-IV-11). The press release also mentioned other species of animals that would receive protection. *See id.* In 1940, in a report to Congress, the National Park Service said that the expansion of the Monument "gave much-needed protection to the giant brown bear." *The Status of Wildlife in the United States*, S. Rep. No. 76-1203, at 353 (Feb. 7, 1940) (Exhibit US-IV-25).

Alaska raises four objections. First, Alaska asserts that the Court cannot infer an intent to preserve brown bears when nothing in the 1939 Proclamation says anything about bears. *See* Alaska Count IV Opposition at 27. The United States responds that a prohibition on considering extrinsic evidence of

[73]In 1937, the National Resources Committee addressed the proposed extension of the Monument in a report. The report said: "The chief reasons that the present monument [should] be increased in size are: (1) it will make a suitable reserve for the brown bear; (2) it will include some of the finest scenery in all Alaska[;] and (3) it will preserve intact a suitable section of the coast forest of Alaska, including the finest extensive stand of Sitka spruce in the Territory." National Resources Committee, *supra*, at 252-253.

the purposes of a federal reservation would block application of the *Idaho* test because federal reservations often do not state in detail the reasons for their creation. *See* U.S. Count IV Reply at 17. The Special Master agrees with the United States. The Court has not relied exclusively on the text of the federal reservations for determining their purposes. For instance, in both *Idaho* and *Montana*, the Court considered extrinsic evidence about how Indian tribes lived in deciding the importance of submerged lands to federal reservations set aside for them. *See Idaho*, 533 U.S. at 265-66, 274 (emphasizing that the Coeur d'Alene Tribe depended on fishing); *Montana*, 450 U.S. at 556 (noting that fishing was not important to the Crow Tribe). The point, however, ultimately does not matter because the 1939 Proclamation's text suffices to establish the purpose of protecting and studying wildlife for the reasons explained above.

Second, Alaska says that President Roosevelt and his advisers believed in 1939 that a National Monument could not serve the purpose of protecting wildlife. Alaska supports this position by observing that, in 1936 and 1937, an attorney in the Solicitor General's office twice wrote memoranda telling the Department of Interior that National Monuments may not serve to protect plants or animals.[74] *See* Memorandum of Golden W. Bell, Assistant Solicitor General, U.S. Dep't of Justice, at 1

[74]The Court has since clarified that a National Monument may serve the purpose of preserving wildlife. *See Cappaert v. United States*, 426 U.S. 128, 141-142 (1976) (upholding power to create the Devil's Hole Monument in Death Valley for the purpose of preserving rare desert fish).

(Jul. 31, 1936) (Exhibit AK-385) (discussing proposed Joshua Tree National Monument); Memorandum of Golden W. Bell, Assistant Solicitor General, U.S. Dep't of Justice, at 1-2 (Apr. 12, 1937) (Exhibit AK-386) (discussing proposed Organ Pipe Cactus National Monument). This evidence is not persuasive. The memoranda recognized that the Interior Department disagreed with the attorney's interpretation of the law, and there is no indication that this view ever became official government policy.

Third, Alaska argues that the administrative history of the 1939 Proclamation in fact shows that the President did not enlarge the Monument for the purpose of preserving brown bear. *See* Alaska Count IV Opposition at 35-42. Alaska asserts that the Department of Interior initially wanted to enlarge the Monument and transform it into a National Park where brown bears would live. Alaska contends, however, that the Department of Interior realized at the end of 1938 that creating a National Park was not possible because Alaskans wanted to continue mining in the area, but conservationists would oppose mining in a National Park. A memorandum from the Acting Director of the National Park Service to the Secretary of Interior supports this view. *See* Memorandum from A.E. Demaray, Acting Director, National Park Service, U.S. Dep't of Interior, to Harold Ickes, Secretary, U.S. Dep't of Interior (Dec. 27, 1938) (Exhibit AK-446).

On March 6, 1939, the Department of Interior transmitted its proposed proclamation to the President. The cover letter said that the expansion would "round out the area geologically and biologically." Letter from E.K. Burlew, Acting Secretary of the Interior and H. Wallace, Secretary of Agriculture to President

Franklin D. Roosevelt (Mar. 6, 1939) (Exhibit AK-384). The cover letter mentioned glaciers, geological features, remnants of ancient forests, and timber, but not bear. The President issued the Proclamation several weeks later. Alaska asserts that this omission in the cover letter confirms that the proponents of the expansion no longer viewed protection of bears as one of its purposes.

It is difficult to reconcile the cover letter sent to the President with the 1939 press release issued by the National Park Service. On the one hand, if preserving the brown bear was an important goal of the expansion, the cover letter ought to have mentioned it. On the other hand, if preserving the brown bear had ceased to be a major purpose of the expansion, then the press release should not have emphasized this purpose. Accordingly, the extrinsic evidence is not entirely consistent. Having examined all of the materials cited by the parties, the Special Master concludes that the great weight supports the position of the United States. (As explained above, however, the Special Master also believes that the plain meaning of the text of the 1939 Proclamation makes examination of this extrinsic evidence unnecessary.)

Finally, Alaska again argues that the United States could protect the brown bear even if it did not have title to submerged lands. *See* Alaska Count IV Opposition at 32-35. This argument lacks merit. As discussed above, Special Master Mann persuasively rejected a similar contention in *Alaska (Arctic Coast)* when he considered the question of title to submerged lands in the Arctic National Wildlife Range.

(6) *Conclusion*. In sum, the United States has shown that the Glacier Bay National Monument, as it existed at the time of

statehood, clearly included the submerged lands within its boundaries. The descriptions of the Monument in the 1925, 1939, and 1955 Proclamations show that the Monument necessarily embraced submerged lands. In addition, excluding submerged lands would undermine the purposes of studying tidewater glaciers and studying and preserving wildlife and the remnants of ancient forests.

2. Retention of Title at Statehood

If the Glacier Bay National Monument is a federal reservation that clearly included submerged lands at the time of statehood, the second question under *Idaho* is whether "Congress recognize[d] the reservation in a way that demonstrates an intent to defeat state title." 533 U.S. at 273. The United States contends that Congress expressed this intent in a proviso to § 6(e) of the Alaska Statehood Act, 72 Stat. at 340-341. Alaska disagrees.

a. The Alaska Statehood Act (ASA)

The Court previously considered the Alaska Statehood Act's retention of federal lands in *Alaska (Arctic Coast)*, 521 U.S. at 55-61. "The Alaska Statehood Act," the Court said, "set forth a general rule that the United States would retain title to all property it held prior to Alaska's admission to the Union, while the State of Alaska would acquire title to all property held by the Territory of Alaska or its subdivisions." *Id.* at 55 (citation omitted). Section 5 of the Alaska Statehood Act says in part: "Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." ASA § 5, 72 Stat. at 340.

Section 6 then states various special rules. For the purposes of this case, the most important of these special rules appear in § 6(m) and § 6(e). Section 6(m) provides that "[t]he Submerged Lands Act of 1953 . . . shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." ASA § 6(m), 72 Stat. at 343. Section 6(e) contains an exception to § 5 and a proviso to that exception. The main clause of § 6(e) says:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency . . . .

ASA § 6(e), 72 Stat. at 340.

Following this main clause, a proviso within § 6(e), prevents Alaska from acquiring title to certain refuges and reservations. This proviso says:

> *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

Id., 72 Stat. at 341.

In *Alaska (Arctic Coast)*, the Court held that § 6(e)'s proviso "reflects a very clear intent to defeat state title" to both uplands and submerged lands. 521 U.S. at 57. Explaining the impact of the proviso, the Court said:

> In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."

Id. (quoting ASA § 6(e)). Applying this interpretation, the Court held that the United States had retained title to the submerged lands within the Arctic National Wildlife Range.[75] *See id.* at 60-61.

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[75] A complication in *Alaska (Arctic Coast)* was that an application for creating the Arctic National Wildlife Range had been made prior to statehood, but the application was not final at the time of statehood. The appropriate analysis of this complication divided the Court. *See* 521 U.S. at 71 (Thomas, J., dissenting). This case does not present a comparable issue because the 1925, 1939, and 1955 Proclamations had established the Glacier Bay National Monument prior to statehood. The *Alaska (Arctic Coast)* decision also held that Congress had retained submerged lands within the National Petroleum Reserve No. 4. *See id.* at 45-46. This retention occurred under ASA § 11(b), which addressed lands "held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4." ASA § 11(b), 72 Stat. at 347. In count IV of this case, the United States relies only on § 6(e) and not on § 11(b).

b. Function of ASA § 6(e)'s Proviso

The United States and Alaska agree that the Glacier Bay National Monument does not fall within the ambit of § 6(e)'s main clause. The Monument was not "property of the United States . . . specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law . . . and under the provisions of the Alaska commercial fisheries laws . . . ." ASA § 6, 72 Stat. at 341. The parties, however, disagree about the consequence of this observation.

Alaska argues that § 6(e)'s proviso acts only as an exception to the main, conveyance clause of § 6(e), not as an independent retention of all lands that the proviso describes. Thus, Alaska argues, the lands affected by the proviso are a "*subset*" of the property described in the main clause. *See* Alaska Count IV Opposition at 44 (emphasis in original). Accordingly, because the Monument does not fit within the main clause of § 6(e), Alaska contends that § 6(e)'s proviso could not have retained the submerged lands within the Monument. It maintains that the submerged lands passed to the State under § 6(m). *See* Tr. Oral Arg. at 149, 167 (Feb. 3, 2003).

The United States objects to this analysis. It asserts that the proviso does not address a subset of the lands covered by the main clause. On the contrary, the United States argues, the main clause and the proviso express two "parallel" principles. U.S. Count IV Reply at 22. These principles, in the United States' view, are that Alaska will receive property covered by the general game and fisheries laws, but that the United States will retain title to all lands set apart as refuges or reservations

for wildlife protection. *See id.* The United States therefore contends that § 6(e)'s proviso may retain submerged lands, even if the submerged lands do not fit within § 6(e)'s main clause. The United States then argues that the Glacier Bay National Monument, like the Arctic National Wildlife Range, was "withdrawn or otherwise set apart" as a refuge or reservation for the protection of wildlife and therefore retained under § 6(e)'s proviso.

Generalizations about the role of a proviso in a statute cannot resolve the dispute between Alaska and the United States about the function of § 6(e)'s proviso. Provisos undoubtedly often serve merely to create exceptions to general rules. The Court, however, has recognized that provisos sometimes state independent rules as opposed to mere exceptions. In *United States v. G. Falk & Bro.*, 204 U.S. 143 (1907), the Court had to determine whether a proviso specifying the time for weighing goods subject to an import duty applied in situations beyond those covered by the main statutory section in which the proviso appeared. The Court noted that often "a proviso refers only to the provision of a statute to which it is appended." *Id.* at 149. The Court, however, said "a presumption of such purpose cannot prevail to determine the intention of the legislature against other tests of meaning more demonstrative." *Id. See also McDonald v. United States*, 279 U.S. 12, 21 (1929) ("[A] proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used.") (citations omitted); *United States v. Whitridge*, 197 U. S. 135, 143 (1905) ("While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of

the principal clause, we cannot forget that in practice no such limit is observed . . . .").[76] The mere identification of a clause in § 6(e) as a proviso, accordingly, does not necessarily mean that the clause refers only to a subset of the lands covered by § 6(e)'s main clause.

The United States argues that precedent supports its view that § 6(e)'s proviso may retain lands even if the lands do not fit within § 6(e)'s main clause. The Arctic National Wildlife Range, the United States asserts, does not fit within the scope of § 6(e)'s main clause because it is not specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the 1943, 1906, and 1924 laws listed in § 6(e)'s main clause. *See* Tr. Oral Arg. at 125 (Feb. 3, 2003). Yet, the United States observes, the Court held that § 6(e)'s proviso retained the Arctic National Wildlife Range as one of the areas "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *See Alaska (Arctic Coast)*, 521 U.S. at 61. The United States accordingly concludes that § 6(e)'s proviso must serve as an independent retention clause, and not merely as an exception to § 6(e)'s main transfer clause.[77]

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[76]A treatise on statutory construction says that using a proviso to state an independent, general rule is "improper drafting," but acknowledges nonetheless that provisos are "frequently used to introduce new and unrelated material." 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:08 at 238 (2000).

[77]The United States said: "The subset theory has an initial appeal, but it has a number of problems. The first one is that if 6(e) really

The United States' argument has a significant difficulty. The Court in *Alaska (Arctic Coast)* assumed in the absence of contrary argument that the Range would fit within the scope of the main clause of § 6(e) but for the proviso. The Court said:

> Under [§ 6(e)'s] clause, the United States transferred to Alaska "[a]ll real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska. . . ." The State does not explain why all of the lands within the Range—uplands as well as submerged lands—would not have been transferred to Alaska at statehood as real property used for the protection of wildlife unless covered by the proviso. *Unless all lands—submerged lands and uplands—covered by the application were "set apart" within the meaning of the proviso to § 6(e), they would have passed to Alaska under the main clause of § 6(e).*

Id. at 60-61 (emphasis added). The Court thus did not need to address the specific argument whether § 6(e)'s proviso could reserve lands that did not otherwise fit within the scope of the § 6(e)'s main clause.

This difficulty, however, does not make the *Alaska (Arctic Coast)* decision inapposite. Although *Alaska* (*Arctic Coast*) did not consider the precise question now posed, the case addressed a very similar question. As in this case, Alaska asserted in

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did have a subset requirement then ANWR would not have been retained by the Federal Government, because ANWR was not held, had not been set apart, solely for the protection of wildlife pursuant to those three statutes." Tr. Oral Arg. at 125 (Feb. 3, 2003).

Alaska (*Arctic Coast*) that the proviso says nothing more than that the lands it describes are not included in the transfer effected by § 6(e)'s main clause. Accordingly, Alaska reasoned, even if the proviso excluded the Arctic National Wildlife Range from the transfer effected by § 6(e), the proviso could have no impact on the transfer effected by § 6(m), which makes the Submerged Lands Act applicable to the State of Alaska. In other words, Alaska argued that, even if the § 6(e) proviso applied, its only impact was to take the Arctic National Wildlife Range out of § 6(e) altogether, leaving the submerged lands within the Range subject to transfer pursuant to § 6(m). *See* Reply Brief for the State of Alaska at 44-45, *United States v. Alaska* (Oct. 10, 1996) (No. 84, Orig.). The Court rejected Alaska's argument, saying:

> If [the Arctic National Wildlife Range is covered by § 6(e)'s proviso], then the United States retained title to submerged lands as well as uplands within the Range. This is so despite § 6(m) of the Statehood Act, which applied the Submerged Lands Act of 1953 to Alaska. The Submerged Lands Act operated to confirm Alaska's title to equal footing lands and to transfer title to submerged lands beneath the territorial sea to Alaska at statehood, *unless* the United States clearly withheld submerged lands within either category prior to statehood. In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those "withdrawn or

> otherwise set apart as refuges or reservations for the protection of wildlife."

521 U.S. at 56-57 (emphasis in original).

The Court thus disagreed with Alaska's proposed interpretation of § 6(e)'s proviso. If, as Alaska had argued, § 6(e) simply had no application to lands covered by its proviso, then some other provision within the Alaska Statehood Act, such as § 6(m), would have to determine the disposition of such lands. The Court's decision, however, treated the proviso as an independent retention clause, not merely as a limitation on a transfer clause. Put another way, if Alaska's construction were correct, § 6(e) as a whole could only transfer property, it would never retain any property.[78] By holding that § 6(e)'s proviso operates independently from § 6(m), the Court decided that § 6(e)'s proviso itself may retain the property it describes.

Based on *Alaska (Arctic Coast)*, the Special Master concludes that § 6(e)'s proviso operates as an independent retention clause and does not merely except certain property from the transfer effected by § 6(e)'s main clause. If the Glacier Bay National Monument is covered by the proviso—an issue addressed immediately below—then the United States retained all the lands, including the submerged lands, within the Monument.

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[78] *See* Reply Brief for the State of Alaska, *United States v. Alaska*, No. 84, Orig., at 44 (1996) ("Congress included section 6(e) in the Statehood Act to transfer property used for fish and wildlife management to Alaska, not to retain property.").

c. Coverage of ASA § 6(e)'s Proviso

If § 6(e)'s proviso operates as an independent retention clause, the question arises whether the Glacier Bay National Monument at the time of statehood was "withdrawn or otherwise set apart as [a] refuge[] or reservation[] for the protection of wildlife" within the meaning of the proviso. The Special Master concludes that it was, for two reasons.

First, all national monuments containing wildlife within their boundaries are set apart for the purpose of conserving this wildlife. As explained above, 16 U.S.C. § 1 directs the National Park Service to administer all national "parks, *monuments*, and reservations" in accordance with

> the fundamental purpose of the said parks, *monuments*, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (emphasis added). The Glacier Bay National Monument is a national monument and it contains wildlife within its boundaries. Accordingly, under 16 U.S.C. § 1, it was set aside for conservation of this wildlife for future generations to enjoy.

Alaska presents no substantial argument against this conclusion. Although the United States relies on 16 U.S.C. § 1 throughout its memorandum in support of summary judgment, Alaska does not cite the statute in its opposition brief. At oral argument, counsel for Alaska dismissed 16 U.S.C. § 1 as a "mishmash of overgeneralization." Tr. Oral Arg. at 163 (Feb. 3, 2003). Counsel explained that the language of the provision

is too broad because some national parks do not have historic objects and some national parks and national monuments do not have any wildlife. *See id.*

This argument overlooks the use of the word "therein" in 16 U.S.C. § 1. Under the statute, monuments are set aside to conserve the wildlife "therein." If some national monuments do not contain wildlife "therein," then this part of the statute does not apply to them. The Glacier Bay National Monument, however, undisputedly contains abundant wildlife within its boundaries, and therefore was set aside for the preservation of this wildlife.

Second, as described previously, the texts of the 1925 Proclamation and the 1939 Proclamation indicate that the Monument was created in part for the purpose of preserving wildlife. *See supra* part IV.B.1.b.(4)-(5). The 1925 Proclamation expressly identifies the study of flora and fauna as one of its purposes. The study of fauna, as explained above, necessarily embraces its preservation. The 1939 Proclamation indicates that the purposes of the expansion include the "proper care, management, and protection of the objects of scientific interest" within the Monument. These objects of scientific interest, according to the 1925 Proclamation, include flora and fauna.

Alaska raises one objection to these arguments on the basis of legislative history. The State has located some documents suggesting that the proviso applies only to refuges and reservations administered by the Fish and Wildlife Service. *See, e.g., Hearings before the Committee on Interior and Insular Affairs on S 50, A Bill to Provide for the Admission of Alaska into the Union*, 83 Cong. (2d Sess.) 55-71 (1954) (Exhibit AK-452) (testimony of the Clarence Rhode, Regional Director of the Fish

and Wildlife Service, which makes no mention of any National Park or National Monument). The United States says that other legislative history points in a different direction. *See* U.S. Count IV Reply at 22. In light of the text of the proviso (which does not mention this limitation), the text of 16 U.S.C. § 1, and the text of the 1925 and 1939 Proclamations, this legislative history does not contribute to the understanding of whether the proviso applies to the Glacier Bay National Park.[79]

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[79] A few administrative materials over the years have identified the Glacier Bay National Monument as an area set aside for wildlife. For example, a 1929 Department of Agriculture publication listed the Glacier Bay National Monument as a "wild-life reservation" administered by the National Park Service. Department of Agriculture, *National Wild-life Reservations*, Miscellaneous Publication No. 51 at 5 & n.1 (1929) (listing the Glacier Bay National Monument but noting that National Monuments are "not strictly game preserves or bird refuges.") (Exhibit US-IV-12). Similarly, as noted above, in a 1940 report to Congress, the National Park Service said that the expansion of the Monument "gave much-needed protection to the giant brown bear." *Status of Wildlife in the United States*, *supra*, at 353. Alaska objects that these obscure documents in all likelihood never came to the attention of the members of Congress who voted for Alaska's statehood. *See* Alaska Count IV Opposition at 49. This objection ultimately has no consequence because § 6(e), 16 U.S.C. § 1, and the texts of the 1925 and 1939 Proclamations make reliance on these administrative materials unnecessary.

The United States also suggests that Congress would not have diminished a national monument except in a much more explicit manner. *See* U.S. Count IV Memorandum at 40-41. It notes that, when Congress eliminated eight other national monuments between

For all of these reasons, the Special Master concludes that the United States retained title to the submerged lands in the Glacier Bay National Monument through § 6(e) of the Alaska Statehood Act.

C. Conclusion

The Special Master recommends that the Court grant summary judgment to the United States on count IV of Alaska's amended complaint and order that Alaska take nothing on its claim to submerged lands within the boundaries of the Glacier Bay National Monument.

V. THE TONGASS NATIONAL FOREST (Count III)

In count III of Alaska's amended complaint, Alaska claims title to "all lands between mean high and mean low tide and three miles seaward from the coast line inside the boundaries of the Tongass National Forest." Amended Complaint to Quiet Title, *supra*, ¶ 43. Alaska specifically asserts that the United States' withdrawal and reservation of lands for the Tongass National Forest did not defeat Alaska's acquisition of title to submerged lands within the Forest's boundaries at the time of statehood. *See id.* ¶ 44. In response, the United States has drafted an intricate disclaimer of title that the parties now agree

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1949 and 1956, it used express statutory provisions. *See, e.g.*, Pub. L. No. 84-891, 70 Stat. 898 (Aug. 1, 1956) (abolishing Fossil Cycad National Monument in South Dakota). A presumption that Congress does not lightly decrease national monuments, however, can have little force when the Court also presumes that Congress does not intend to defeat state title to submerged lands.

satisfies all of their interests and concerns. The Special Master recommends that the Court confirm this disclaimer and dismiss count III for lack of jurisdiction.

A. Overview

Two late-19th century statutes gave the President power to reserve federal forest lands. Section 24 of the Act of March 3, 1891, authorized the President to set apart as public reservations "public lands wholly or in part covered with timber or undergrowth." 26 Stat. 1095, 1103 (1891) [hereinafter 1891 Act]. The Act of June 4, 1897, continued this authorization, but limited the purposes of reservations under the 1891 Act. *See* 30 Stat. 11, 34-35 (1897) [hereinafter 1897 Act]. The 1897 Act decreed: "No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ." *Id.* at 35.

In 1902, 1907, 1909, and 1925, Presidents Theodore Roosevelt and Calvin Coolidge issued proclamations pursuant to these statutes setting aside lands now included in the Tongass National Forest. *See* Proclamation No. 37, 32 Stat. 2025, 2025-26 (1902) (setting aside the Alexander Archipelago Forest Reserve, which was later added to the Tongass National Forest); Proclamation of Sept. 10, 1907, 35 Stat. 2152 (1907) (creating the Tongass National Forest); Proclamation of Feb. 16, 1909, 35 Stat. 2226 (1909) (expanding the boundaries of the Tongass National Forest); Proclamation No. 1742, 44 Stat. 2578 (1925) (same). Various other proclamations, including ones related to

the Glacier Bay National Monument, have removed some of these lands.

These proclamations have made the Tongass National Forest by the far the largest national forest in the United States. As the chart in Appendix O shows, the Forest's boundaries surround almost the entire Alexander Archipelago and the Southeast Alaskan mainland. The Forest extends nearly 500 miles from north to south, and 100 miles from east to west, and covers a total area of almost 17 million acres.

In count III of its amended complaint, as noted, Alaska claims title to submerged lands within the Tongass National Forest that lie within three nautical miles of Alaska's coast line. *See* Amended Complaint to Quiet Title, *supra*, ¶ 43. The location of Alaska's coast line, as discussed in parts II and III above, depends on whether the waters of the Alexander Archipelago are inland waters or territorial sea. If they are historic inland waters or the inland waters of juridical bays, then the State's coast line would run along the limit of these inland waters. *See* Submerged Lands Act, 43 U.S.C. § 1301(c) (defining the "coast line" to follow the "line marking the seaward limit of inland waters"). Otherwise, Alaska's coast line generally would follow the shores of the islands and the mainland. *See id.* (defining the coast line to follow "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea" where there are no inland waters). In either case, the State's boundaries would encompass all submerged lands lying within three miles of the coast line. *See id.* at § 1301(b). The State would possess title to all submerged lands within its boundaries, *see id.* § 1311(a)(1),

unless the United States retained title to them at statehood, *see id.* at § 1313(a).

As described in part IV above, the Court has decided several recent cases concerning federal reservations of submerged lands. The Court begins with a "strong presumption" against interpreting federal legislation to defeat a state's acquisition of title. *Montana*, 450 U.S. at 552. It then applies a "two-step test of congressional intent" to determine whether Congress prevented submerged lands from transferring to a state under the Submerged Lands Act. *Idaho*, 533 U.S. at 273. The Court asks (1) whether "an Executive reservation clearly includes submerged lands," and (2) whether "Congress recognize[d] the reservation in a way that demonstrates an intent to defeat state title." *Id.* (citations omitted).

Alaska moved for summary judgment on count III, contending that the United States could not satisfy either test with respect to the submerged lands within the Tongass National Forest. With respect to the first test, Alaska argued that Presidents Roosevelt and Coolidge lacked authority to include submerged lands in the Tongass National Forest and did not intend to include them. *See* Alaska Count III Memorandum at 6-36. The State asserted that submerged lands did not constitute "public lands" and thus could not be reserved under the 1891 Act. *See id.* at 11-16. In addition, Alaska contended that reserving submerged lands would not improve the forest or secure conditions of favorable water flows as required for reservations under the 1897 Act. *See id.* at 7-11. Alaska also said that the language of the relevant proclamations revealed an intent only to reserve uplands. *See id.* at 16-36. With respect to the second test Alaska asserted that nothing in the Alaska

Statehood Act retained the submerged lands within the Tongass National Forest. *See id.* at 37-49.

The United States filed a memorandum in response to Alaska's motion. In the memorandum, the United States expressed doubt about Alaska's position that the 1902, 1907, and 1909 proclamations did not embrace submerged lands. *See* U.S. Count III Response at 5 & n.3. The United States; however, agreed with Alaska that Congress did not clearly intend to retain title to submerged lands at statehood merely because those lands were located within the Forest's boundaries. *See id.* at 5. In contrast to its argument with respect to submerged lands within the Glacier Bay National Monument, the United States did not contend that the proviso in § 6(e) of the Alaska Statehood Act, 72 Stat. at 340-41, retained the submerged lands within the Tongass National Forest.

The United States, however, did not concede that Alaska should receive summary judgment on count III. The United States argued that even though Congress did not intend to reserve submerged lands merely because they were within the Tongass National Forest, Alaska still did not own all of the submerged lands within the Forest's boundaries. On the contrary, the United States identified four classes of property to which the State might not have title or was not claiming title. *See* U.S. Count III Response at 6-9.

One class of submerged lands identified by the United States consists of lands subject to § 5 of Submerged Lands Act, § 43 U.S.C. § 1313. This provision establishes certain exceptions to the ordinary transfer of title to the states. One exception in § 5 is for "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." *Id.* § 1313(a). The United

States asserted that the Forest Service has built log transfer facilities, docks, and other structures on submerged lands that may come within this exception. *See* U.S. Count III Response at 8. Another exception in § 5 covers "all structures and improvements constructed by the United States in the exercise of its navigational servitude." 43 U.S.C. § 1313(c). The United States apparently also has made improvements of this kind. *See* U.S. Count III Response at 8-9. Still another exception is for lands "expressly retained" by the United States. 43 U.S.C. § 1313(a). As explained in the analysis of count IV, the proviso in § 6(e) of the Alaska Statehood Act retains lands set aside for the protection of wildlife. *See* ASA § 6(e), 72 Stat. 340-41. Although the United States did not argue that the presidential proclamations retained the entire Tongass National Forest for the purpose of preserving wildlife, the United States asserted that the Forest Service administratively had set aside some submerged lands for this purpose. *See* U.S. Count III Response at 9.

A second class of submerged lands identified by the United States consists of lands within the boundaries of the Tongass National Forest that lie more than three miles from Alaska's coast line. *See id.* at 6. Alaska would not acquire title to these lands under the Submerged Lands Act because a state's boundaries extend only three miles from its coast line. *See* 43 U.S.C. § 1301(b). Alaska's complaint, moreover, seeks title only to lands within its boundaries. *See* Amended Complaint to Quiet Title, *surpa*, ¶ 43.

A third class of submerged lands identified by the United States consists of lands reserved under the jurisdiction of agencies other than the Department of Agriculture, which

administers the Tongass National Forest through the Forest Service. The Quiet Title Act requires a state to give 180 days' notice of intent to sue to the federal agency with jurisdiction over the land in dispute before commencing a legal action. *See* 28 U.S.C. § 2409a(m) (2000). Alaska apparently gave this notice to the Department of Agriculture, but to no other agency. *See* U.S. Count III Response at 6-7.

The fourth class of submerged lands consists of lands held for military, naval, Air Force, and Coast Guard purposes. *See* U.S. Count III at 7 n.4. Section 11(b) of the Alaska Statehood reserved these lands to the United States. *See* ASA § 11(b), 72 Stat. at 347; *Alaska (Arctic Coast)*, 521 U.S. at 41-42.

In light of this submission, and a subsequent motion filed jointly by the parties, the Special Master stayed proceedings on count III so that the parties could engage in discussions regarding the proper wording of a disclaimer that would satisfy the interests of both parties. Following those discussions, with the advice and approval of Alaska, the United States prepared the proposed disclaimer of title included in Appendix A.

B. The Proposed Disclaimer

In the first paragraph of the proposed disclaimer the United States generally disclaims title to submerged lands within the boundaries of the Tongass National Forest. This paragraph says:

> (1) Pursuant to the Quiet Title Act, 28 U.S.C. 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.

The second paragraph then lists four exceptions corresponding to the special classes of property described above that the United States may have retained at statehood. This paragraph says:

> (2) The disclaimer set out in paragraph (1) does not disclaim:
>
> (a) any submerged lands that are subject to the exceptions set out in Section 5 of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1313;
>
> (b) any submerged lands that are more than three miles seaward of the coast line;
>
> (c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;
>
> (d) any submerged lands that were held for military, naval, Air Force or Coast Guard purposes on the date Alaska entered the Union.

Paragraph (2), importantly, merely creates exceptions to the disclaimer. It does not establish that the United States has title to any specific lands. If the Court confirms the disclaimer, Alaska and the United States would remain free to contest title to areas covered by these exceptions outside this litigation. *See* Memorandum in Support of Unopposed Motion of the United States for Confirmation of the Disclaimer of Title to Marine Submerged Land Within the Tongass National Forest at 6-7 [hereinafter U.S. Disclaimer Memorandum].

Paragraph (3) contains necessary definitions. A very significant clause is paragraph (3)(e), which clarifies what paragraph (2)(a) means when it creates an exception for "expressly retained" submerged lands covered by the exception in § 5 of the Submerged Lands Act, 43 U.S.C. § 1313(a). Paragraph (3)(e) says that "expressly retained" lands under § 5 include lands under the Department of Agriculture's jurisdiction only if those lands were withdrawn by federal actions *other than* the 1902, 1907, 1909, and 1925 Proclamations or were subject to certain listed applications for withdrawal. It thus makes clear that the United States is not claiming title to any submerged lands merely because of their inclusion in the proclamations creating the Tongass National Forest.

C. Confirmation and Dismissal

The Quiet Title Act recognizes that the United States sometimes may wish to disclaim ownership of property when sued in a quiet title action. A sufficient and proper disclaimer by the United States makes adjudication of a quiet title action unnecessary. The Quiet Title Act, accordingly, provides that a disclaimer will terminate federal court jurisdiction. The Act, in 28 U.S.C. § 2409a(e), says:

> If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

28 U.S.C. § 2409a(e). Although this section refers to the jurisdiction of "the district court," the parties assume (without argument) that it applies equally to the jurisdiction of the Supreme Court. *See* U.S. Disclaimer Memorandum at 6; Alaska's Disclaimer Reply to at 3.[80]

Under the language of the quoted provision, a disclaimer requires the dismissal of a quiet title claim only if the disclaimer is "confirmed by order of the court." In this case, both the United States and Alaska support confirmation of the United States' proposed disclaimer. *See* Alaska Disclaimer Reply at 3. An amicus brief filed on behalf of the Wilderness Society, the Sierra Club, and the National Wildlife Federation (the Environmental Group Amici), however, argues against confirmation.[81] *See* Brief of *Amici Curiae* the Wilderness Society, Sierra Club, and National Wildlife Federation in Opposition to the United States's Motion for Confirmation of the Proposed Disclaimer [hereinafter Amici Disclaimer Opposition]. A question thus has

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[80] As explained previously, *see supra* part I.A., 28 U.S.C. § 2409a and § 1346(f) appear to contemplate that federal district courts will hear quiet title actions. The Court, however, has held that it may exercise original jurisdiction over quiet title actions brought by a state against the United States under § 2409a. *See California v. Arizona*, 440 U.S. at 67-68 (suit by California against Arizona and the United States).

[81] The Special Master also invited amicus participation by a group of Alaska Natives (Franklin H. James, the Shakan Kwaan Thling-Git Nation, Joseph K. Samuel, and the Taanta Kwaan Thling-Git Nation) who had earlier sought leave to intervene in this litigation. This group did not file a brief.

arisen about the proper scope of judicial inquiry when deciding whether to confirm a disclaimer of title and what conclusion that inquiry should produce in this case.

1. Positions of the Parties and Amici

The United States and Alaska characterize the task of confirming a disclaimer as automatic or ministerial. *See* U.S. Disclaimer Memorandum at 6; Alaska Disclaimer Reply at 14. In their view, the Court must determine only whether the disclaimer fully covers the lands at issue, leaving nothing to adjudicate, and whether the United States acted in good faith in making the disclaimer. *See* U.S. Disclaimer Memorandum at 6; Alaska Disclaimer Reply at 14. They accordingly assert that the Court should not consider the merits of any claim that the United States might have to the property.

The United States and Alaska specifically reject any comparison of the disclaimer to a settlement and also reject any equating of the confirmation of the disclaimer to the issuance of a consent decree. *See* U.S. Disclaimer Reply at 8-11; Alaska Disclaimer Reply at 11-14. On the contrary, they view the disclaimer as a unilateral disavowal of title by the United States not requiring any compromise or agreement by Alaska. The disclaimer, they assert, by itself removes any cloud on Alaska's title and thereby eliminates any controversy.

The Environmental Group Amici have a very different view. They liken the confirmation of a disclaimer to the issuance of a consent decree. *See* Amici Disclaimer Opposition at 2. They accordingly argue that the Court may confirm the disclaimer only if it is "fair, adequate, and reasonable" and "not illegal or contrary to the public interest." *Id.* (quoting *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (internal quotation marks omitted)).

The Environmental Group Amici then make a three-step argument for why the Court should conclude that the United States retained title to the submerged lands at issue in count III. First, they argue that Presidents Roosevelt and Coolidge had authority to include submerged lands within the Tongass National Forest. The Amici explain that the 1891 Act allowed the President to reserve "public lands wholly or in part covered with timber" and thus permitted reservations to extend into submerged lands. *See id.* at 14 (quoting 26 Stat. 1103).

Second, the Environmental Group Amici assert that the reservations made in the 1902, 1907, 1909, and 1925 proclamations necessarily embraced submerged lands. *See id.* at 15. They assert that the proclamations set boundary lines in the territorial sea to ensure the inclusion of submerged lands. *See id.* They further contend that reservation of tidelands and submerged lands was critical to the purpose of the Tongass National Forest; they explain that the Forest Service needed title to establish docks and wharves because the sea furnished the only access to the Forest. *See id.* at 16.

Third, the Environmental Group Amici contend that the United States retained the submerged lands in § 5 and § 6(a) of the Alaska Statehood Act. Section 5 of the Alaska Statehood Act, as explained above, generally retained federal property. *See* ASA § 5, 72 Stat. at 340. Section 6(a) then created an exception allowing Alaska to choose 400,000 acres of national forest lands. *See id.* § 6(a), 72 Stat. at 340. The Amici argue that § 6(a) thereby implies that the United States retained all

other National Forest lands, including the submerged lands at issue in this case. *See* Amici Disclaimer Opposition at 20-21.

2. Analysis

Although the Environmental Group Amici are not parties to this litigation, their position deserves special attention because of the context in which they have filed their brief. When the United States responded to Alaska's motion for summary judgment, the United States asked for, and later received, a stay to allow the United States and Alaska to develop a "stipulation" that would provide the "basis for formulating a consent decree respecting Count III." U.S. Count III Response at 11. The United States further said that the "appropriate point for the amici curiae to articulate their objections . . . would be at the conclusion of the collaborative process that the United States envisions for reaching a stipulation respecting the federally retained parcels." *Id.* Yet now that the United States has prepared a disclaimer, and the Amici have attempted to respond, the United States denies that confirming a disclaimer is like entering a consent decree. The United States also now admits no role for the Environmental Group Amici to play in voicing their concerns about the merits.

Under these circumstances, the Amici understandably may feel that their views on the merits were called for but then excluded from consideration. The Special Master, however, sees no way to interpret § 2409a(e) to make confirmation depend on whether litigation might have demonstrated that the submerged lands at issue in count III belong to the United States. Several factors lead to this conclusion.

First, interpreting § 2409a(e) to require resolution of the merits would render disclaimers purposeless. If disclaimers do not make litigation of the merits unnecessary, then they accomplish nothing. Moreover, if a court has decided the merits, dismissing the case without entering a judgment based on its decision would waste the effort expended by the court. Congress surely did not intend these results when it enacted § 2409a(e). *See United States v. Wilson*, 503 U.S. 329, 334 (1992) (holding that arbitrary or absurd results are to be avoided in the process of statutory interpretation).

Second, interpreting § 2409a(e) to require consideration of the merits would raise a constitutional difficulty. If the United States has disclaimed title, then no dispute continues to exist between the parties. An examination of the merits, accordingly, might violate Article III's case or controversy requirement. *See* U.S. Const. art. III, § 2; *Muskrat v. United States*, 219 U.S. 346, 362 (1911). The doctrine of avoidance counsels against this interpretation. *See United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter") (citation omitted).

Third, a disclaimer of title under § 2409a(e) differs from a settlement confirmed by a consent decree. A settlement typically involves an agreement and compromise by both parties. When a court confirms a settlement by a consent decree, the court customarily retains jurisdiction and puts its authority behind the decree. In such circumstances, courts do not act without first examining the legality of the settlement.

See Local Number 93, Intern. Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986) (while the "parties' consent animates the legal force of a consent decree," a court must insure that the parties do not "agree to take action that conflicts with or violates the statute upon which the complaint was based") (citations omitted).

A disclaimer under § 2409a(e), by contrast, consists of a unilateral disavowal of interest by the United States. Section § 2409a(e) does not require the concurrence of the plaintiff. In this case, for example, although the United States and Alaska discussed the wording of the disclaimer, the parties did not "settle" because Alaska did not compromise its claim in any way. Moreover, because § 2409a(e) requires dismissal for lack of jurisdiction after confirmation, a court does not put its continuing authority behind a decree. A court thus does not have the same reason to examine the legality of the disclaimer as it does the legality of a consent decree.

Finally, the limited precedent available generally supports the view that courts should not examine the grounds on which the United States has decided to disclaim title. Although no cases say very much about the confirmation inquiry under § 2409a(e), federal circuit and district courts have confirmed disclaimers under § 2409a(e) without questioning the legal basis for the United States' determination that it does not have title. *See, e.g., Leisnoi Inc. v. United States*, 313 F.3d 1181, 1184 (9th Cir. 2002); *Lee v. United States*, 809 F.2d 1406, 1409 (9th Cir. 1987), *cert. denied sub nom. Lee v. Eklutna, Inc.*, 484 U.S. 1041 (1988); *Alaska v. United States*, 662 F. Supp. 455, 457-58 (D. Alaska 1987), *aff'd sub nom. Alaska v. Ahtna Inc.*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919

(1990); *Madan v. United States*, 850 F. Supp. 148, 151 (N.D.N.Y. 1994); *W.H. Pugh Coal Co. v. United States*, 418 F. Supp. 538, 539 (E.D. Wis. 1976).

One might argue that, if a court's confirmation of a disclaimer is purely ministerial and involves no review of the disclaimer's legality, then the requirement of confirmation seems purposeless. The United States, however, suggests a plausible purpose for the confirmation requirement besides serving as a vehicle for judicial review of a disclaimer's legality. The United States suggests that Congress might have been concerned that an executive branch disclaimer of title, if not accompanied by a court order, could be insufficient to provide a landowner with clear title. Accordingly, the United States suggests, the purpose of the confirmation requirement is to ensure that a landowner who brings suit under the Quiet Title Act has a clear, marketable title following a dismissal of the action on the basis of a disclaimer.[82] U.S. Disclaimer Reply at 6.

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[82]The United States also suggests that "[t]he purpose of the QTA's confirmation process is to ascertain that the United States' disclaimer has in fact eliminated the dispute between the parties and thereby justifies dismissal of the action in whole or in part." U.S. Disclaimer Reply at 4; *see also* Alaska Disclaimer Reply at 7 (making a similar suggestion). The Special Master finds this other suggested purpose less plausible, because, in applying the disclaimer provision, a court would have to determine whether the United States had disclaimed "all interest in the real property or interest therein adverse to the plaintiff," even if § 2409(e) did not require the court to "confirm" the disclaimer.

One district court case held that § 2409a(e) did not permit the United States to convey property to a third party following the commencement of a quiet title action and then disclaim interest in the property. *See LaFargue v. United States*, 4 F. Supp. 2d 580, 589 (E.D. La. 1998). The court reasoned that "such a disclaimer—*i.e.*, one based on the sale of the government's interest after the filing of a quiet title action—is not the type of disclaimer contemplated by § 2409a(e)." *Id.* Nothing comparable happened here; the United States simply conceded that it did not have title without first attempting to convey the property to someone other than Alaska.

The Environmental Group Amici object that allowing the Solicitor General to decide whether the United States has title to property would strip power from Congress and the courts. They assert that if Congress did not intend for Alaska to take title to the submerged lands at issue in count III, then the executive branch may not overrule that decision. Accordingly, in their view, the courts must review the merits of the United States' position before confirming the disclaimer. *See* Amici Disclaimer Opposition at 7-8.

This objection fails because Congress has authorized the executive branch to make disclaimers in § 2409a(e). The executive branch thus does not act contrary to the desires of Congress by making disclaimers pursuant to this provision. Section 2409a(e), moreover, does not represent an improper delegation of power to the executive branch. Even before § 2409a(e)'s enactment, the Court recognized that the Solicitor General could remove issues from a case under his broad authority to litigate on behalf of the federal government. *See Utah v. United States*, 394 U.S. 89, 94-95 (1969) (holding that

the Solicitor General could enter a stipulation that the United States would not demand payment for certain valuable lands because the Solicitor General believed he could "advance no colorable argument which could conceivably vindicate the Federal Government's" interest in the lands).

Having concluded that § 2409a(e) does not permit a court to make an independent assessment of the United States' claim to title, a question remains as to what a court should consider in deciding whether to confirm a disclaimer. The Special Master agrees with the answer supplied by the United States and Alaska. In the absence of any allegation of bad faith or other extenuating circumstance, the court should determine only whether the disclaimer fully addresses the lands at issue and thus should ensure that dismissal will not prejudice the plaintiff. *See* U.S. Disclaimer Reply at 2; Alaska Disclaimer Reply at 3. This position appears to coincide with the position taken in the federal circuit and district court cases cited above. Here, Alaska and the United States agree that the confirmation serves this purpose.[83] The Special Master has reviewed the matter with care and concurs in their agreement. Accordingly, no grounds exist for rejecting the United States' proposed disclaimer.

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[83]Because of the exceptions in the disclaimer, the United States may not have disclaimed all interest in the real property described in count III of Alaska's amended complaint. Alaska nevertheless agrees that the United States has disclaimed its "interest therein adverse to the plaintiff." *See* Alaska Disclaimer Reply at 3.

D. Conclusion

For the foregoing reasons, the Court should confirm the United States' proposed disclaimer as set out in Appendix A. The parties agree that this confirmation will deprive the Court of jurisdiction over Alaska's claim in count III. *See* 28 U.S.C. 2409a(e). The Court therefore should include the disclaimer in its decree, dismiss Alaska's motion for summary judgment on count III as moot, and dismiss count III of Alaska's amended complaint for lack of jurisdiction.

VI. CONCLUSION

For the reasons set forth in this report, the Special Master recommends that the Court grant summary judgment to the United States on counts I, II, and IV of Alaska's amended complaint, deny summary judgment to Alaska on counts I and II, and confirm the United States' proposed disclaimer of title to the submerged lands at issue in count III. The Court's decree should (1) state that Alaska takes nothing on counts I, II, and IV of its amended complaint; (2) incorporate the disclaimer for count III as it appears in Appendix A below; (3) dismiss Alaska's motion for summary judgment on count III as moot; and (4) dismiss count III for lack of jurisdiction. These actions will end this litigation.

Respectfully submitted,

Gregory E. Maggs
Special Master

Washington, D.C.
March 2004

APPENDICES

APPENDIX A

Proposed Order Confirming the United States' Disclaimer of Certain Marine Submerged Lands Within the Tongass National Forest(a)

(1) Pursuant to the Quiet Title Act, 28 U.S.C. 2409a(e), and subject to the exceptions set out in paragraph (2), the United States disclaims any real property interest in the marine submerged lands within the exterior boundaries of the Tongass National Forest, as those boundaries existed on the date of Alaska Statehood.

(2) The disclaimer set out in paragraph (1) does not disclaim:

(a) any submerged lands that are subject to the exceptions set out in Section 5 of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1313;

(b) any submerged lands that are more than three miles seaward of the coast line;

(c) any submerged lands that were under the jurisdiction of an agency other than the United States Department of Agriculture on the date of the filing of the complaint in this action;

(d) any submerged lands that were held for military, naval, Air Force or Coast Guard purposes on the date Alaska entered the Union.

(3) For purposes of this disclaimer:

(a) The term "coast line" means "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters," as defined in Section 2(c) of the Submerged Lands Act, ch. 65, Tit. II, § 5, 67 Stat. 32, 43 U.S.C. 1301(c).

(b) The term "submerged lands" means "lands beneath navigable waters" as defined in Section 2(a) of the Submerged Lands Act, ch. 65, Tit. II, §5, 67 Stat. 32, 43 U.S.C. 1301(a).

(c) The term "marine submerged lands" means "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide."

(d) The term "jurisdiction" has the meaning of that word in the Quiet Title Act, 28 U.S.C. 2409a(m).

(e) The exception set out in Section 5 of the Submerged Lands Act for lands "expressly retained by or ceded to the United States when the State entered the Union" does not include lands under the jurisdiction of the Department of Agriculture unless, on the date Alaska entered the Union, that land was: (i) withdrawn pursuant to act of Congress, presidential proclamation, executive order, or public land order of the Secretary of Interior, other than the presidential proclamation of

August 20, 1902 (32 Stat. 2025), which established the Alexander Archipelago Forest Reserve; the presidential proclamation of September 10, 1907 (35 Stat. 2152), which created the Tongass National Forest; or the presidential proclamations of February 16, 1909 (35 Stat. 2226) and June 10, 1925 (44 Stat. 2578), which expanded the Tongass National Forest; or (ii) subject to one or more of the following pending applications for withdrawal pursuant to 43 C.F.R. Part 295 (Supp. 1958), designated by Bureau of Land Management serial numbers: AKA 022828; AKA 026916; AKA 029820; AKA 031178; AKA 032449; AKA 033871; AKA 034383; AKJ 010461; AKJ 010598; AKJ 010761; AKJ 011157; AKJ 011168; AKJ 011203; AKJ 011210; AKJ 011212; AKJ 011213; AKJ 011291.

APPENDIX B

Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639.

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

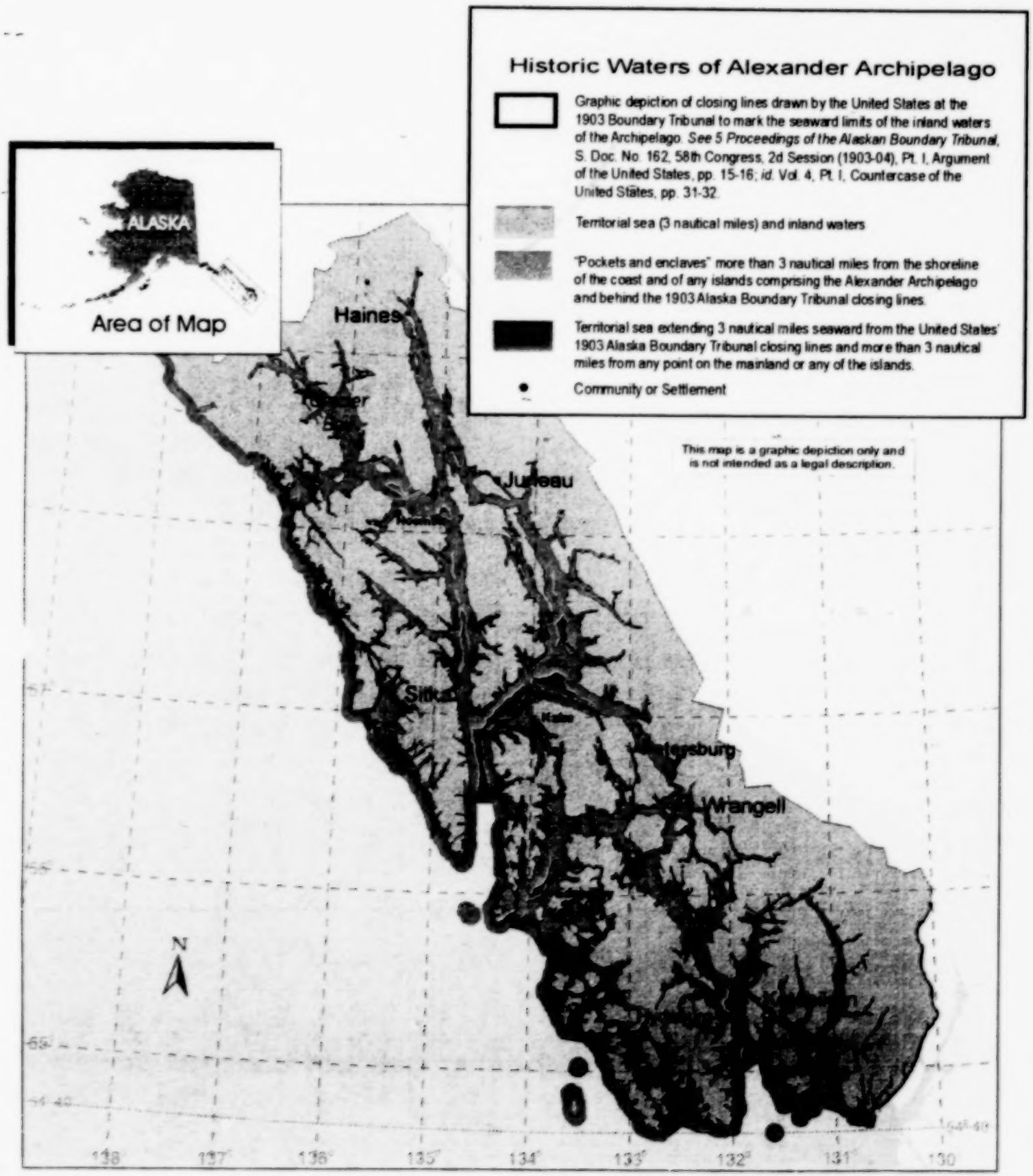
4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

APPENDIX C

Graphic Depiction of Claimed Historic Waters



Prepared by the Department of Natural Resources, Division of Mining, Land & Water - Technical & Data Management Section *October, 1999*

APPENDIX D

Graphic Depiction of Claimed Juridical Bays

JURIDICAL BAYS

NORTH SOUTHEAST

SOUTH SOUTHEAST

The area is depicted as one bay for illustrative purposes. It may comprise more than one bay.

Islands within the indentation or creating more than one mouth under Convention Article 7(3).

Illustration of approximate juridical bay closing lines or baselines. Due to limitations of scale, such lines that measure less than one nautical mile are not depicted.

The smaller juridical bays, Sitka Sound and Cordova Bay are labeled but not otherwise highlighted in this graphic. Closing lines or baselines for the smaller juridical bays are not depicted.

This map is a graphic depiction only and is not intended as a legal description.

Kuiu Is.

Kupreanof Is.

N

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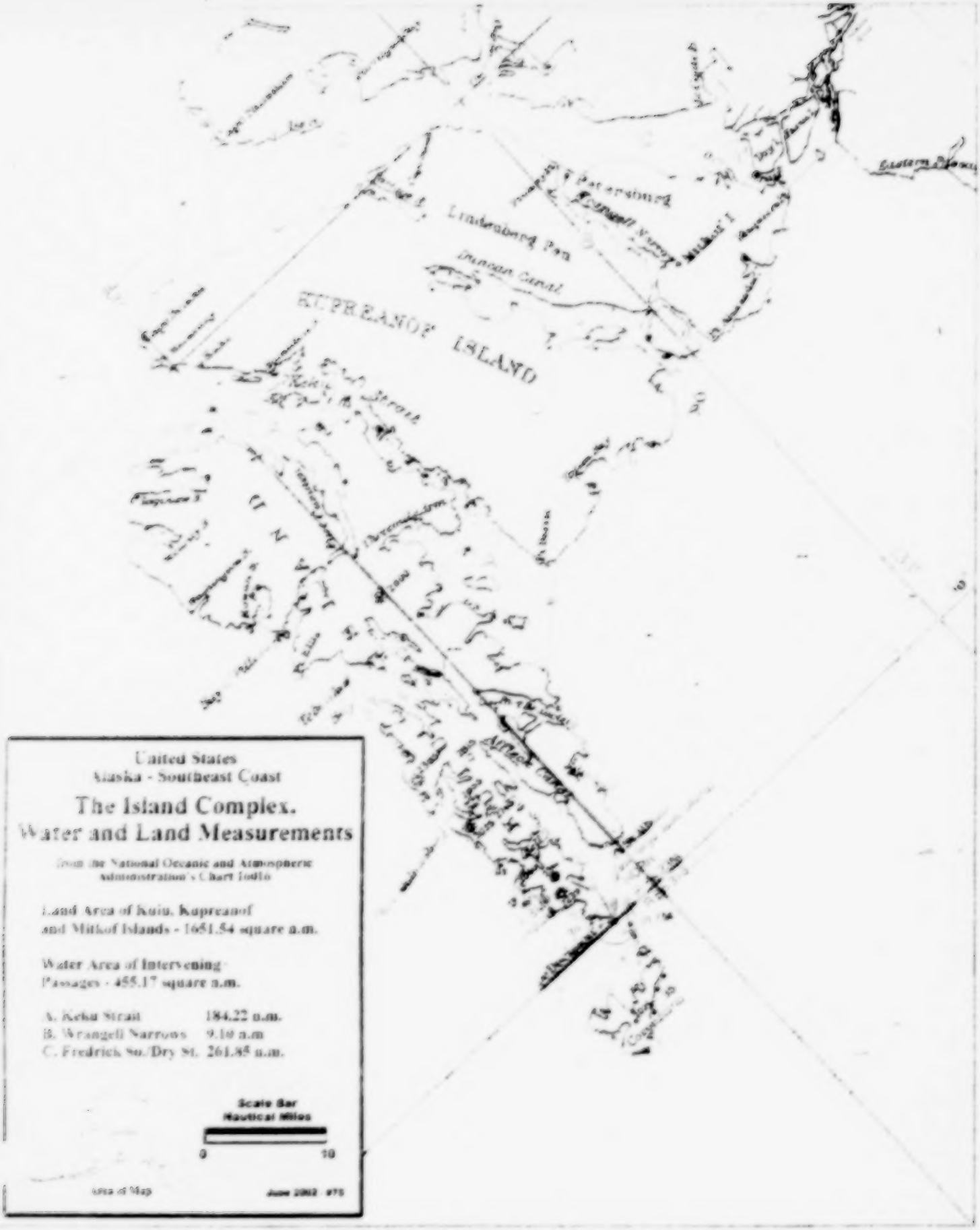
APPENDIX E

Chart Showing Dry Island, Mitkof Island, Kupreanof Island, and Kuiu Island



United States
Alaska - Southeast Coast

The Island Complex. Water and Land Measurements

From the National Oceanic and Atmospheric Administration's Chart 16016

Land Area of Kuiu, Kupreanof and Mitkof Islands - 1651.54 square n.m.

Water Area of Intervening Passages - 455.17 square n.m.

A. Kuiu Strait	184.22 n.m.
B. Wrangell Narrows	9.10 n.m
C. Fredrick Sd./Dry St.	261.85 n.m.

Scale Bar
Nautical Miles

0 10

Area of Map

APPENDIX F

Chart Showing Kruzof Island, Baranof Island, and Partofshikof Island

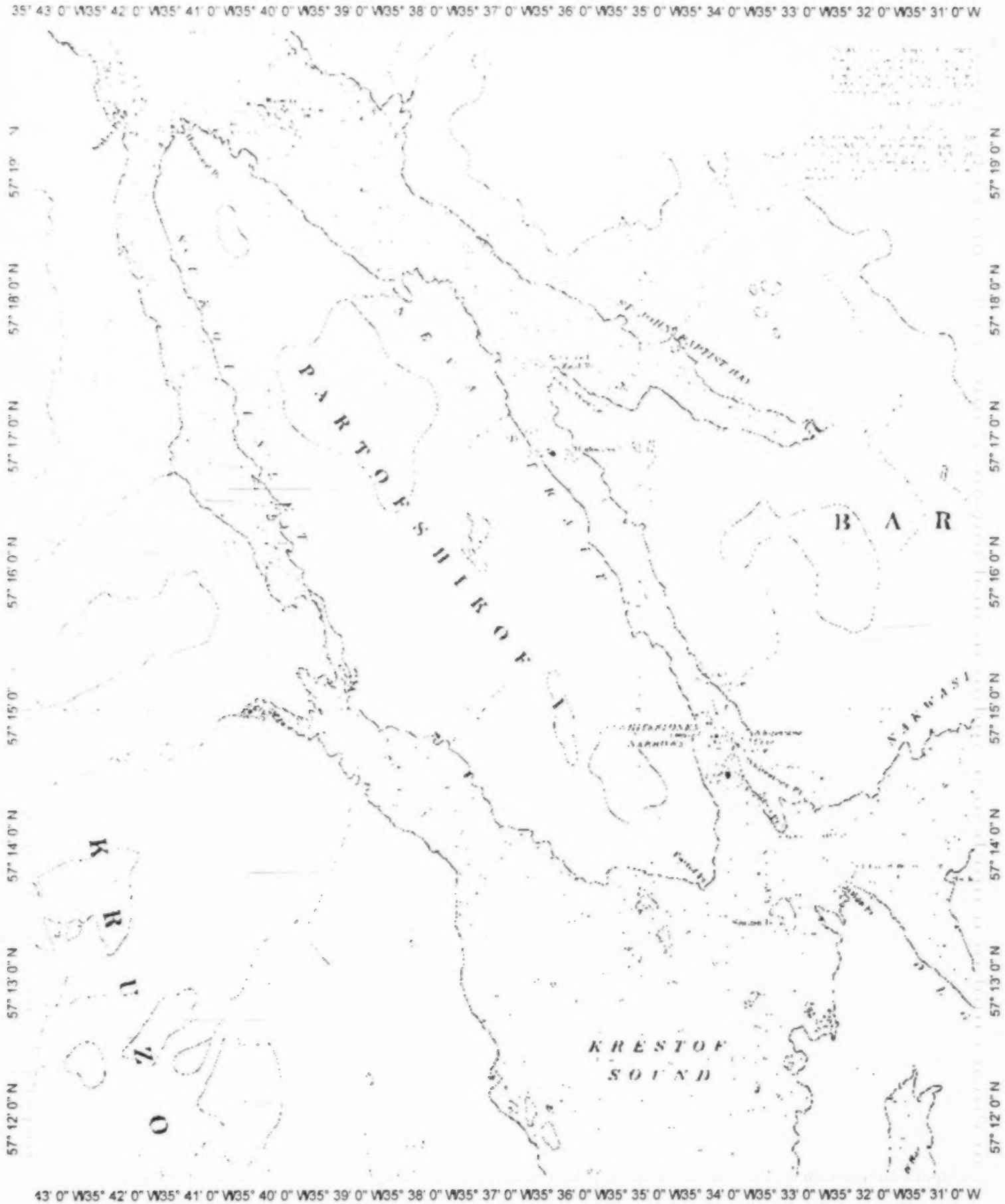


Chart Name: SITKA SOUND TO SALISBURY SOUND INSIDE PASSAGE
Chart ID: 17324_1
Top Left: 57° 19' 57" N 135° 43' 8" W
Bottom Right: 57° 11' 35" N 135° 30' 29" W

® MAPTECH, INC.

APPENDIX G

Chart Showing Prince of Wales Island and Dall Island

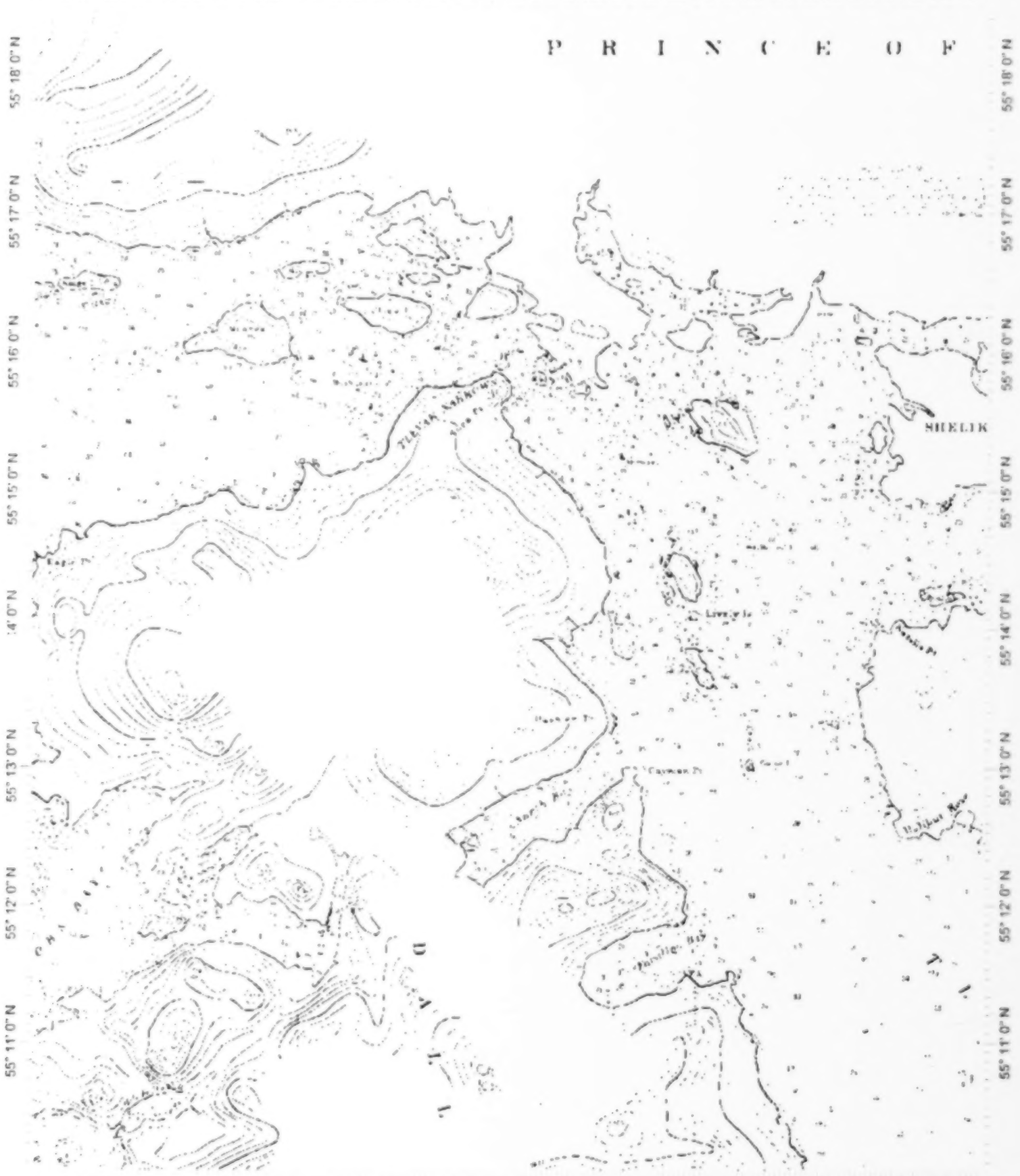


Chart Name:	NORTHERN PART OF TLEVAK STRAIT AND ULLOA CHANNEL
Chart ID:	17407_1
Top Left:	55° 18' 27" N 133° 13' 21" W
Bottom Right:	55° 10' 4" N 133° 1' 21" W

® MAPTECH, INC.

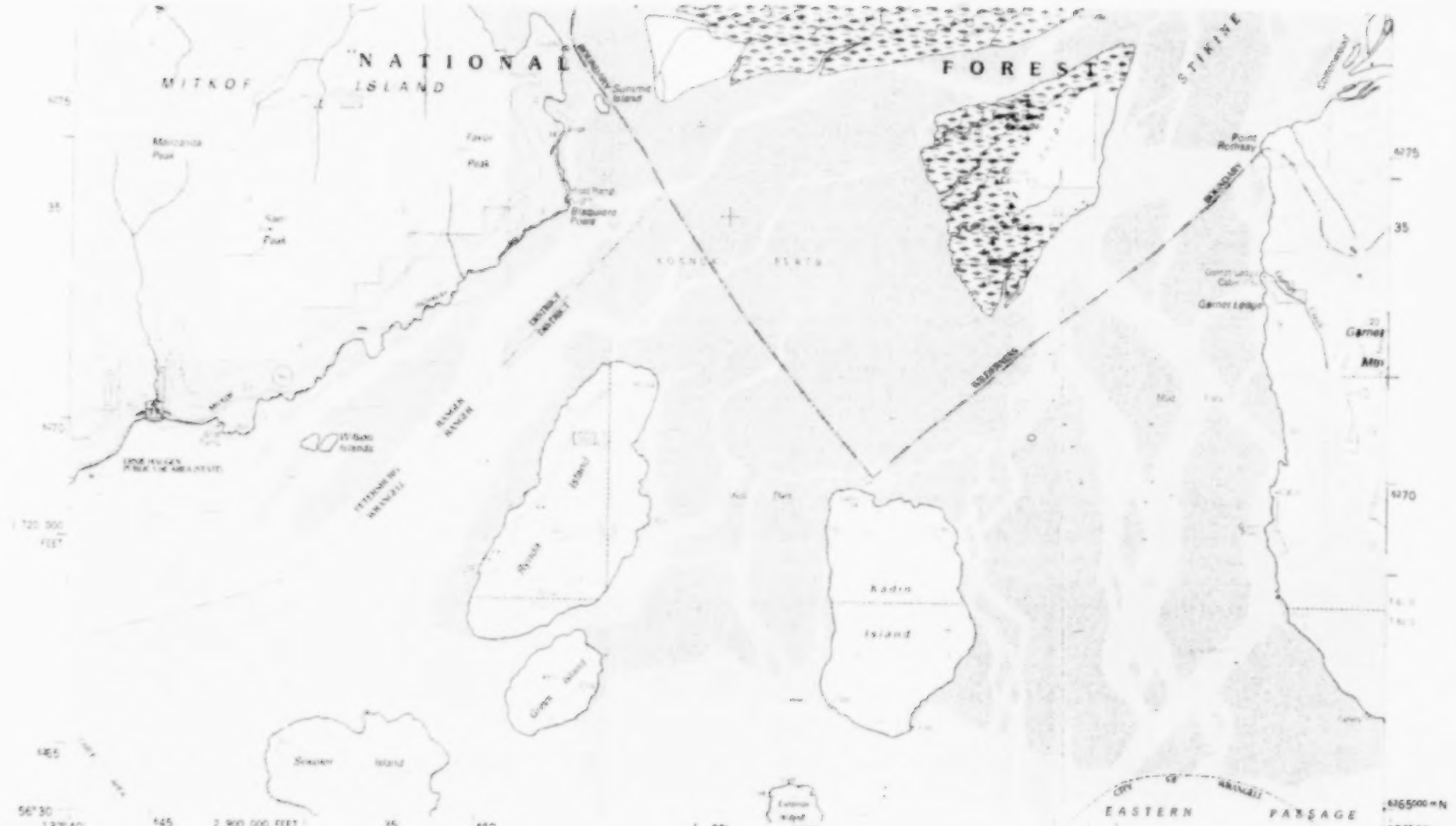
APPENDIX H

Large-Scale Map Showing Dry Island and Mitkof Island

U.S. DEPARTMENT OF THE INTERIOR
U.S. GEOLOGICAL SURVEY

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

PETERSBURG C-2 QUADRANGLE
ALASKA
1:63 360 SERIES (TOPOGRAPHIC)



Produced by the United States Geological Survey 1965
Revision by USDA Forest Service 1997

Topography compiled 1948. Planimetry derived from imagery taken 1996 and other sources. Public Land Survey System and survey control current as of 1997

North American Datum of 1927 (NAD 27). Projection and 20 000-foot ticks: Alaska coordinate system, zone 1 (transverse Mercator)
Blue 5000-meter Universal Transverse Mercator ticks, zone 8

North American Datum of 1983 (NAD 83) is shown by dashed corner ticks. The values of the shift between NAD 27 and NAD 83 for 7 5-minute intersections are obtainable from National Geodetic Survey, NADCON software

Non-National Forest System lands within the National Forest boundaries may exist in other National or State reservations

This map is not a legal land line or ownership document. Public lands are subject to change and leasing, and may have access restrictions; check with local offices. Obtain permission before entering private lands

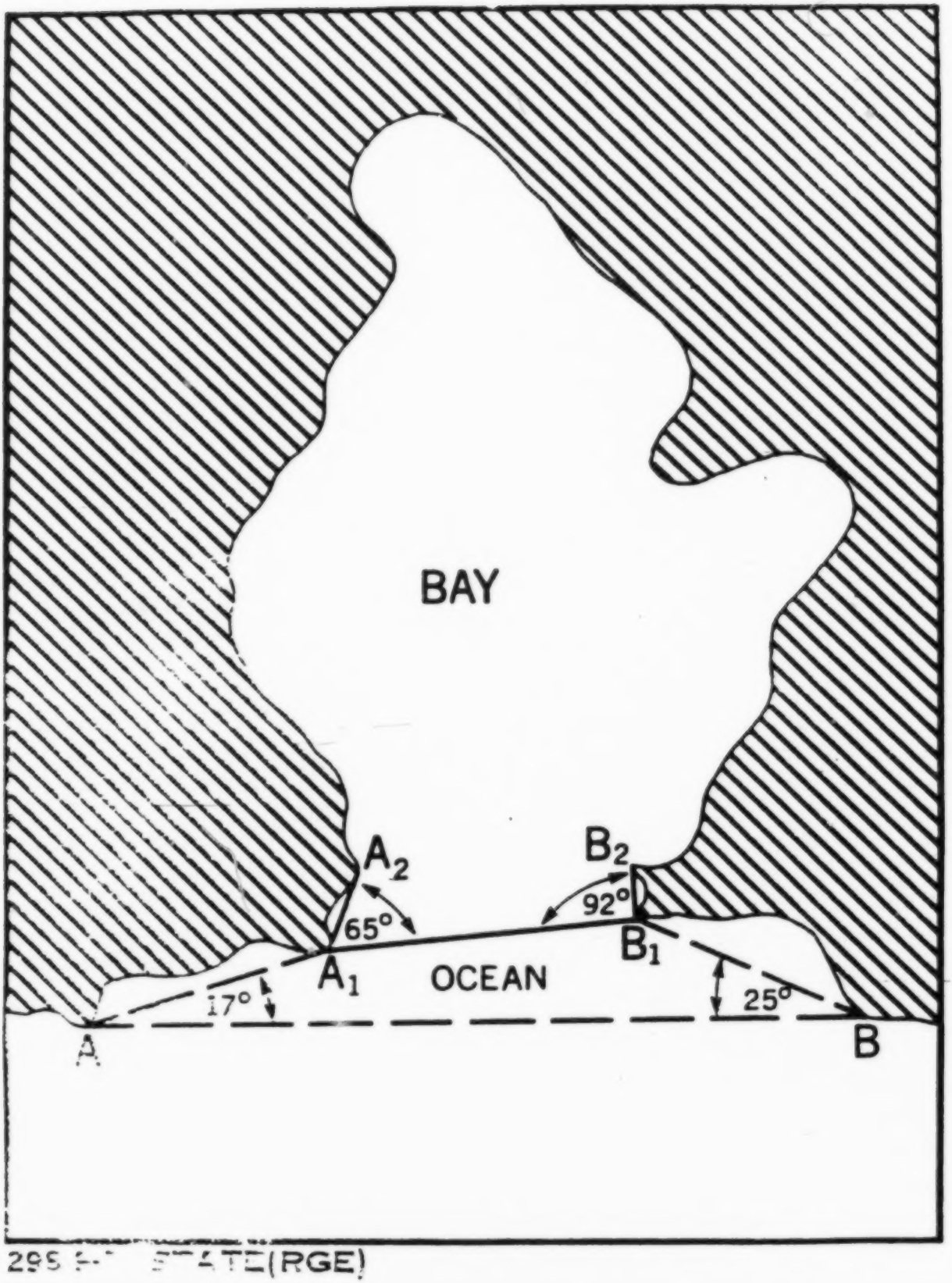
Protracted land lines are predetermined by the Bureau of Land Management, Copper River Meridian

UTM GRID AND 1999 MAGNETIC NORTH DECLINATION AT CENTER OF SHEET

FOR SALE BY U.S. GEOLOGICAL SURVEY, P.O. BOX 25286, DENVER, COLORADO 80225
A FOLDER DESCRIBING TOPOGRAPHIC MAPS AND SYMBOLS IS AVAILABLE ON REQUEST

APPENDIX I

Illustration of the 45-Degree Test from Robert D. Hodgson & Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances: Bays, Rivers, Coastal and Oceanic Archipelagos and Atolls, Law of the Sea Institute Occasional Paper No. 13* at 11, fig. 4 (Apr. 1972)

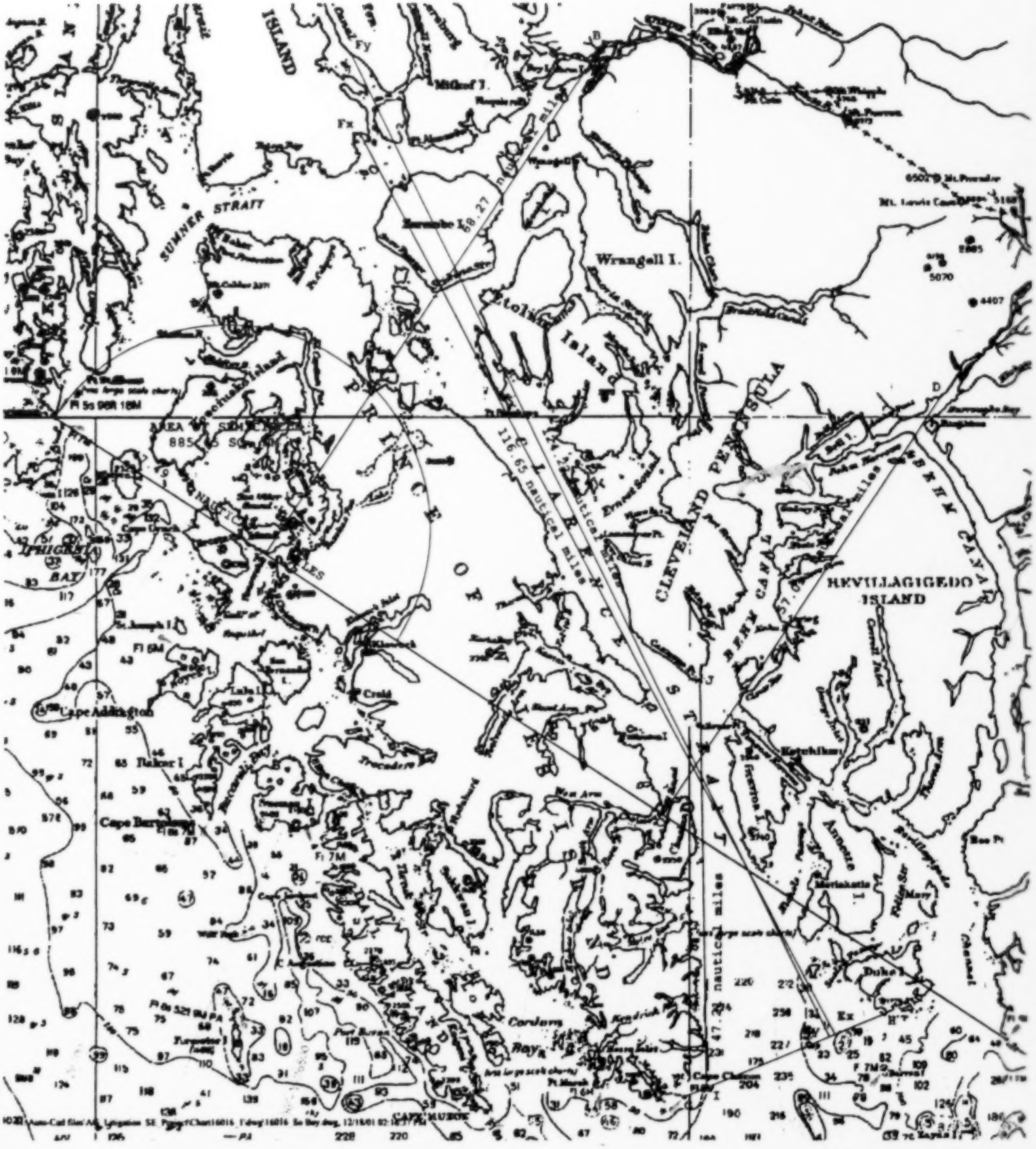


295 [illegible] STATE(RGE)

Figure 4. Application of 45° Test to Determine A_1-B_1 as Proper Bay Closing Line.

APPENDIX J

Alaska's Proposed Longest Straight Line of Penetration for South Bay



HW 14426

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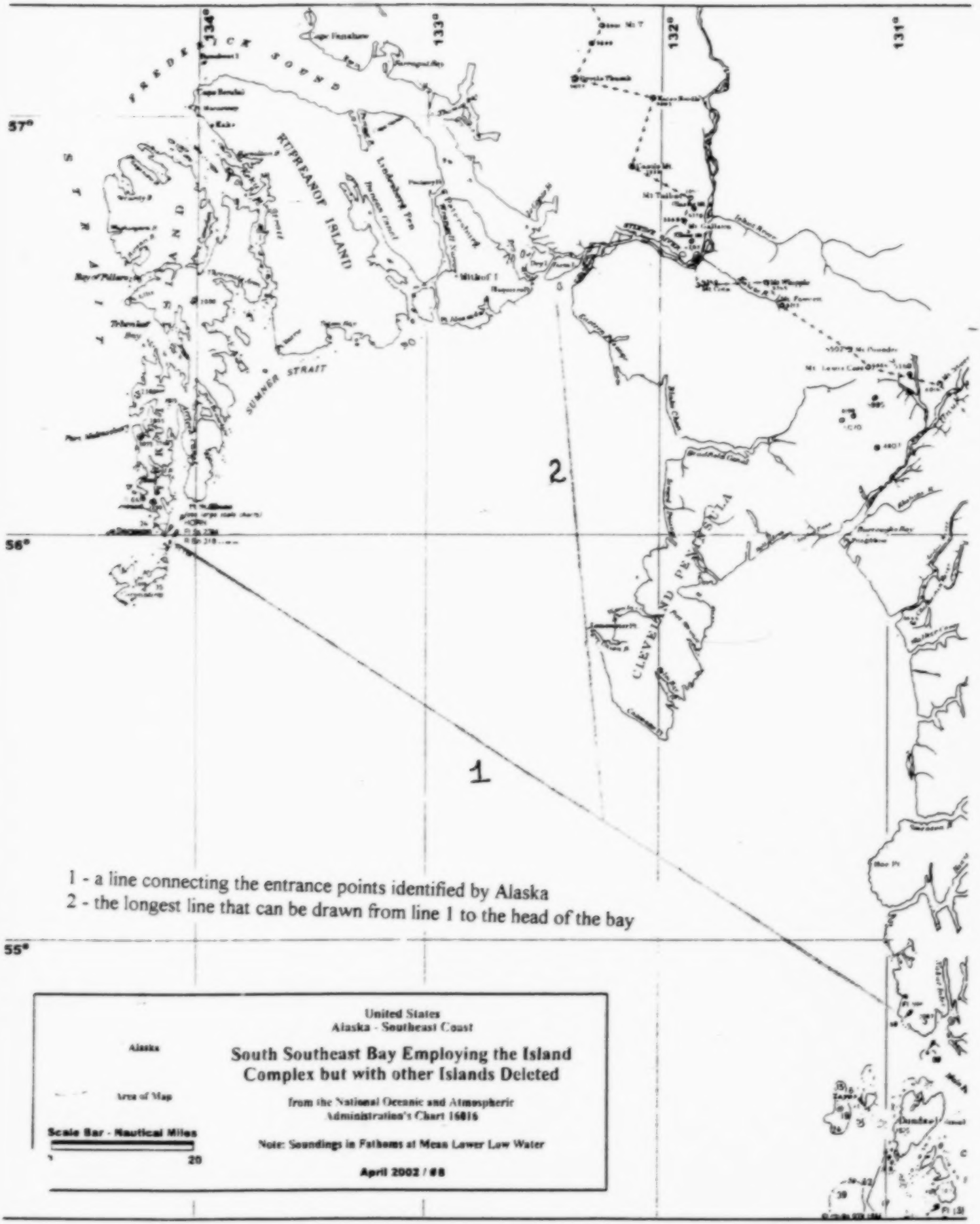
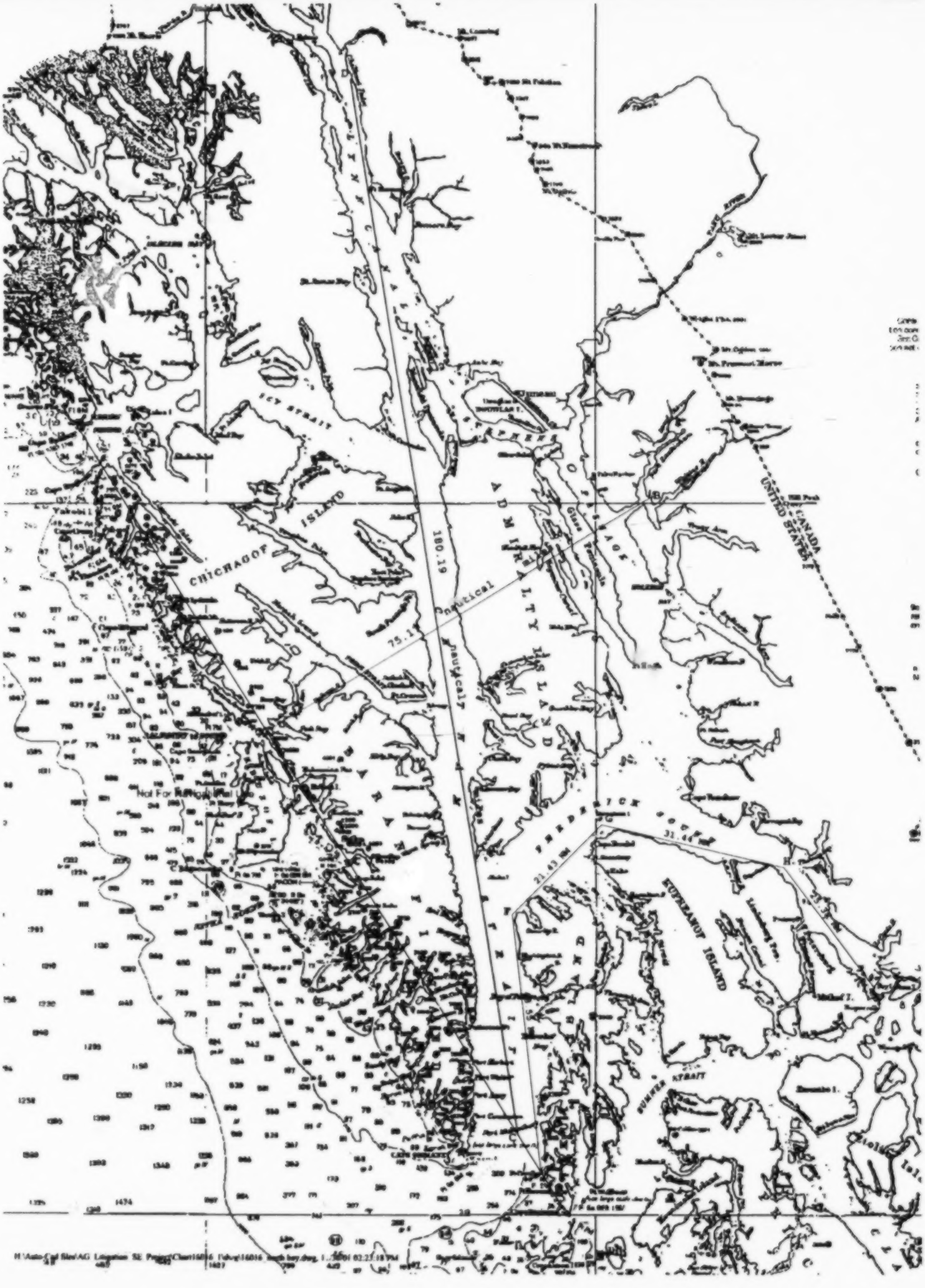
APPENDIX K

United States' Proposed Longest Straight Line of Penetration for South Bay


134°
133°
132°
131°
57°
56°
55°
FREDERICK SOUND
KUIU ISLAND
KUPREANOF ISLAND
SUMNER STRAIT
CLEVELAND PENINSULA
2
1
1 - a line connecting the entrance points identified by Alaska
2 - the longest line that can be drawn from line 1 to the head of the bay
United States
Alaska - Southeast Coast
Alaska
South Southeast Bay Employing the Island Complex but with other Islands Deleted
Area of Map
from the National Oceanic and Atmospheric Administration's Chart 16016
Scale Bar - Nautical Miles
20
Note: Soundings in Fathoms at Mean Lower Low Water
April 2002 / #8

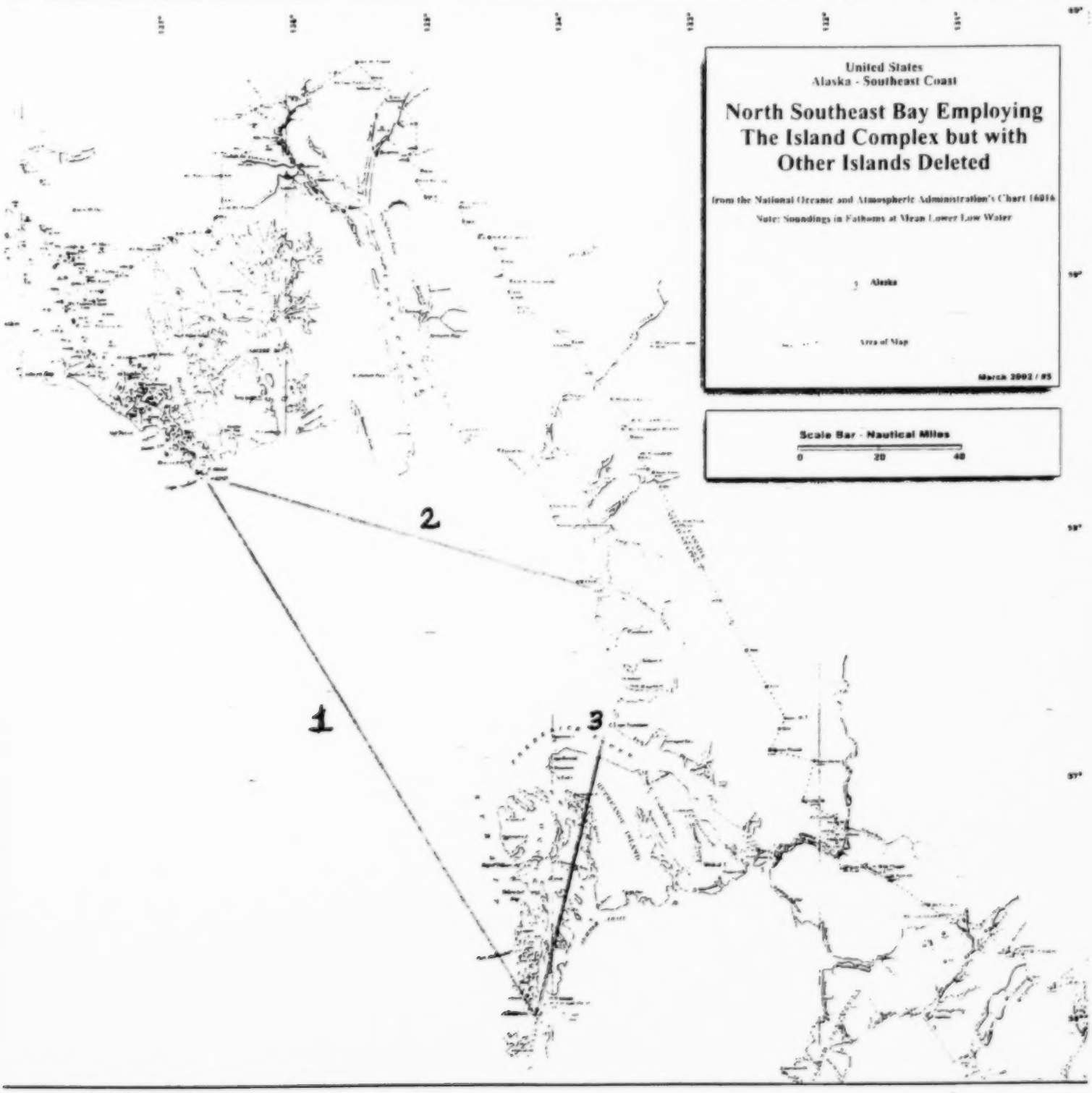
APPENDIX L

Alaska's Proposed Longest Straight Line of Penetration for North Bay


ICY STRAIT
CHICHAGOF ISLAND
ADMIRALTY ISLAND
180.19
Nautical
75.1
Not For Navigation
KUPREANOF ISLAND
KUIU ISLAND
FREDERICK SOUND
CANADA
UNITED STATES OF

APPENDIX M

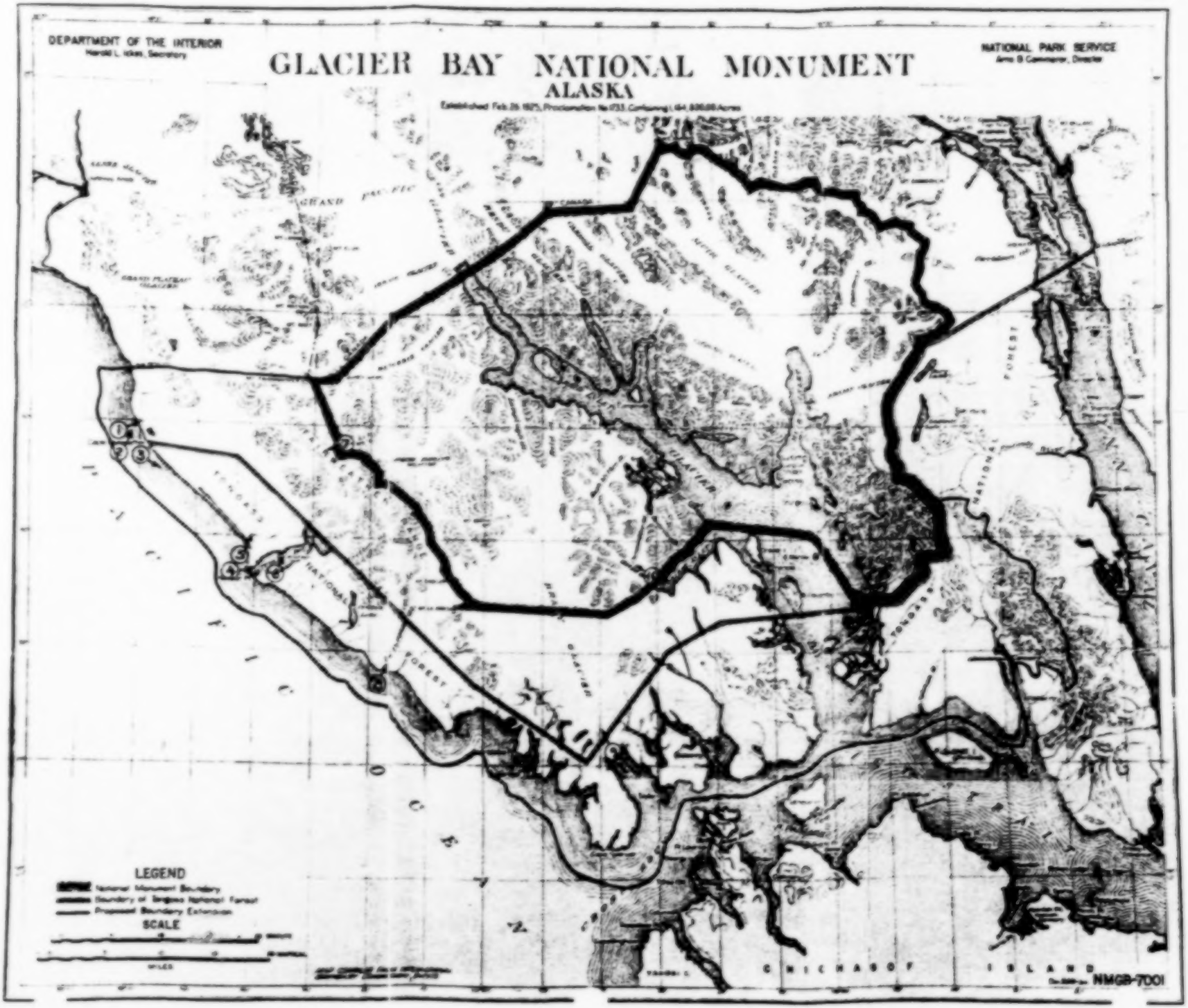
United States' Proposed Longest Straight Line of Penetration for North Bay



1 - a line connecting the entrance points identified by Alaska
2 - the longest line that can be drawn from line 1 to the head of the Bay
3 - a line drawn 45 degrees from line 1 at the southern entrance point

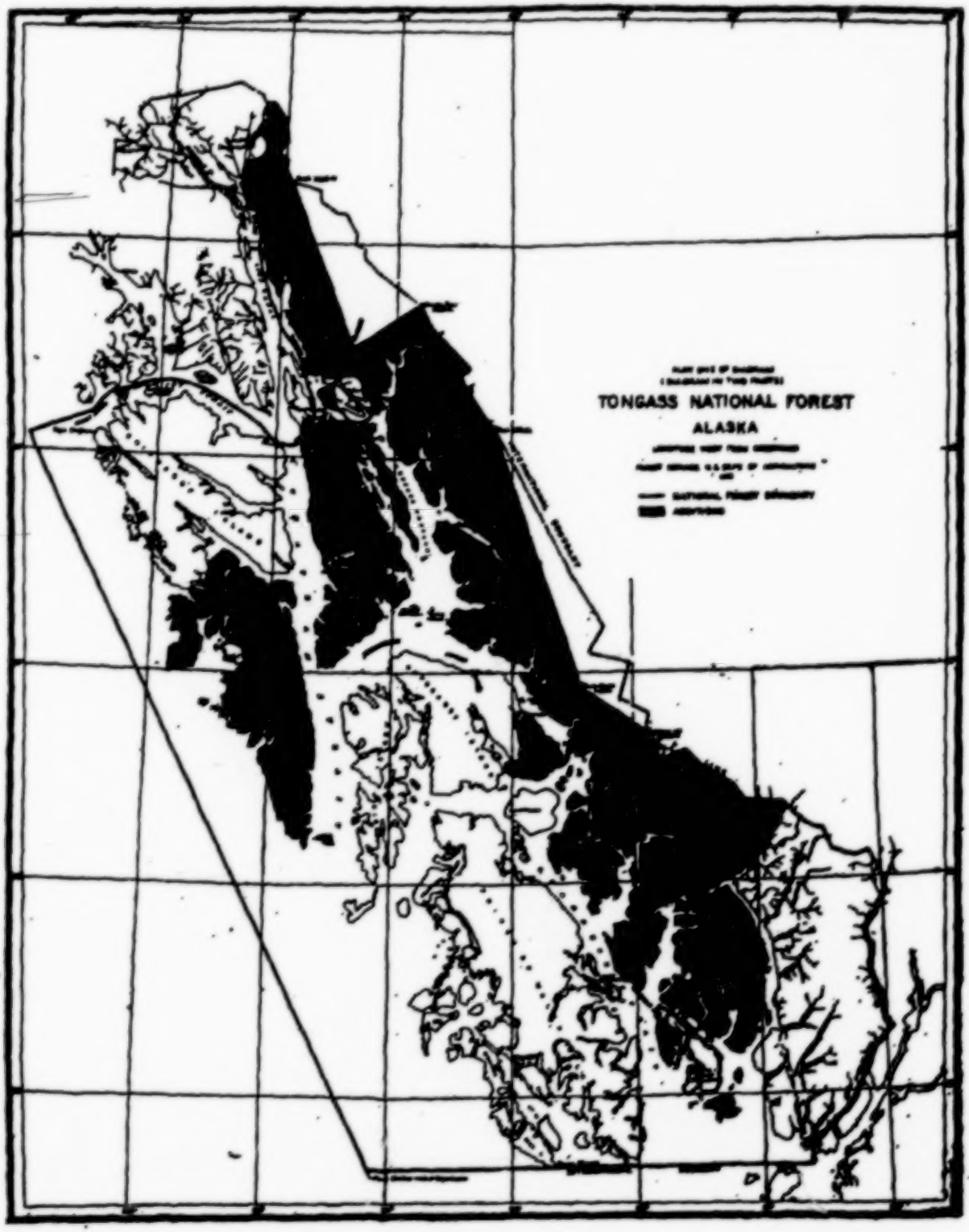
APPENDIX N

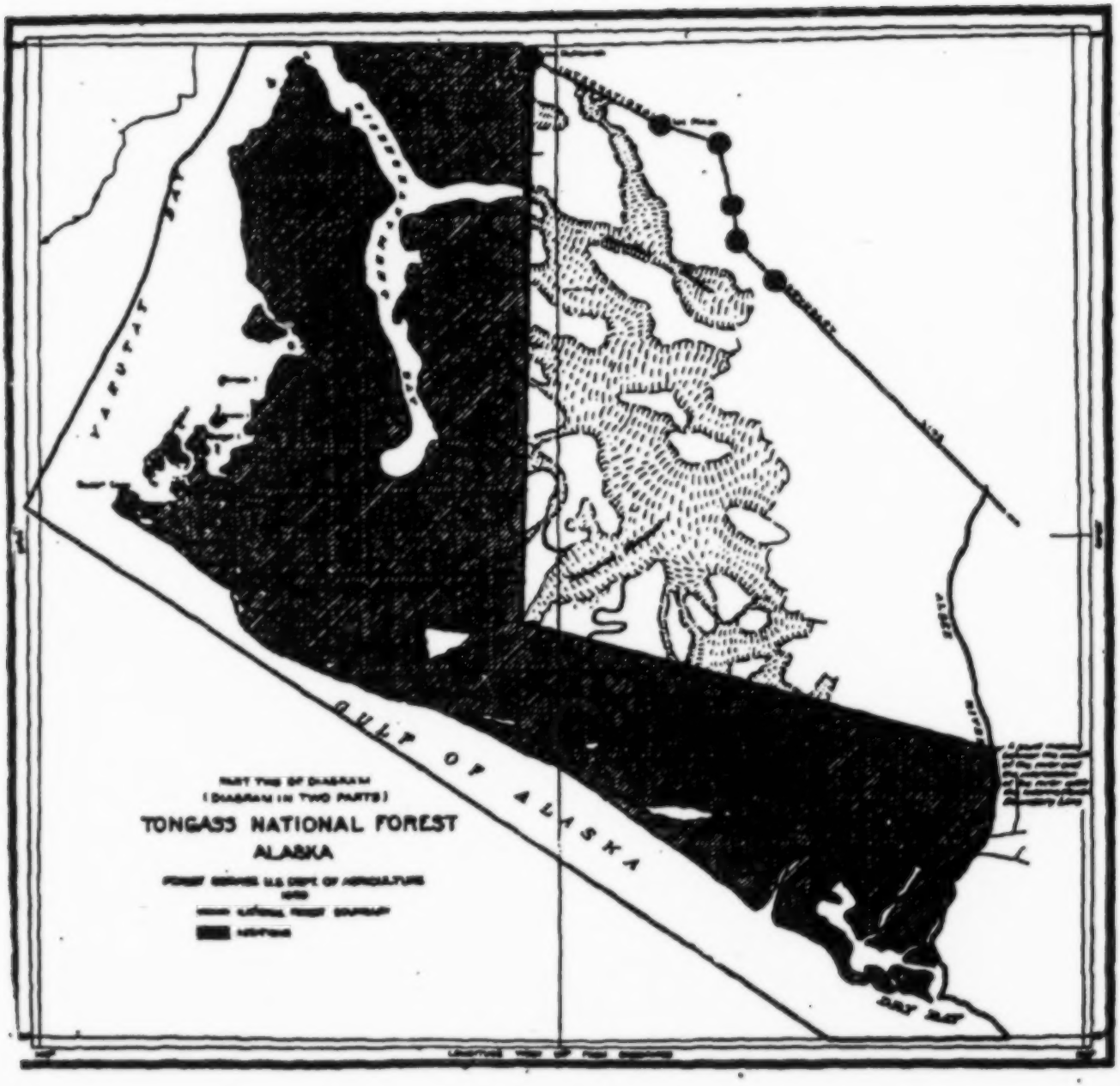
Chart of the Glacier Bay National Monument


DEPARTMENT OF THE INTERIOR
Harold L. Ickes, Secretary
GLACIER BAY NATIONAL MONUMENT
ALASKA
NATIONAL PARK SERVICE
Arno B. Cammerer, Director
LEGEND
SCALE
CHICHAGOF ISLAND
NMGB-7001

APPENDIX O

Chart of Tongass National Forest


TONGASS NATIONAL FOREST
ALASKA


PART TWO OF DIAGRAM
(DIAGRAM IN TWO PARTS)
TONGASS NATIONAL FOREST
ALASKA
GULF OF ALASKA

Supreme Court, U.S.
FILED
JUL 12 2004
OFFICE OF THE CLERK

(16)

No. 128, Original

IN THE
Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Exceptions to Report of Special Master on Motions for Summary Judgment

EXCEPTIONS TO REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT FOR PLAINTIFF STATE OF ALASKA

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Counsel for Plaintiff

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EXCEPTIONS TO REPORT OF SPECIAL MASTER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Plaintiff State of Alaska respectfully submits the following exceptions to the Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title (the "Report"):

1. The Court should decline to adopt the Special Master's recommendation that the United States be granted summary judgment on Count IV of the Amended Complaint. *See* Report at 227-276. Instead, the Court should grant summary judgment to Alaska on Count IV because, *inter alia*, the plain language of Section 6(e) of the Alaska Statehood Act does not express the requisite unambiguous intent of Congress to reserve for the United States submerged lands within the boundaries of the Glacier Bay National Monument, but rather expressly applies only to a narrow subset of other lands that are indisputably not at issue here.

2. The Court should decline to adopt the Special Master's recommendation that the United States be granted summary judgment on Count I of the Amended Complaint. *See* Report at 9-137. Instead, the Court should grant summary judgment to Alaska on Count I because the undisputed historical record demonstrates that the United States continuously exercised sovereignty over the waters of the Alexander Archipelago with the acquiescence of foreign nations, and the Nation's vital interests support a finding of historic waters status.

3. The Court should decline to adopt the Special Master's recommendation that the United States be granted summary judgment on Count II of the Amended Complaint. *See* Report at 138-226. Instead, the Court should grant summary judgment to Alaska on Count II as to the areas referred

to as North Bay and South Bay because the undisputed record demonstrates that the areas qualify as juridical bays under Article 7 of the Convention on the Territorial Sea and Contiguous Zone, and the assimilation principles adopted and applied by this Court in *United States* v. *Maine*, 469 U.S. 504 (1986).

Alaska does not take exception to, and urges the Court to adopt, the Special Master's separate recommendation that the Court confirm the United States' disclaimer of title relating to Count III of the Amended Complaint and dismiss Count III for lack of jurisdiction. *See* Report at 276-294.

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6 Fed. Reg. 6471 (1941) 13

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Robert D. Hodgson & Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances*, Law of the Sea Occasional Paper No. 13 (1972) 44, 46

BRIEF IN SUPPORT OF ALASKA'S EXCEPTIONS

JURISDICTION

This Court has original jurisdiction over this case pursuant to 28 U.S.C. § 1251(b)(2).

STATUTORY PROVISIONS INVOLVED

Pertinent statutes are set forth in the appendix to this brief.

INTRODUCTION

This case is "one of the largest quiet title actions ever litigated." Report at 2. It involves submerged lands within the Alexander Archipelago—an area of Southeast Alaska more than 500 miles long and 100 miles wide containing over 1000 islands. *Id.* The waters of the Archipelago are central to the region's history, economy and society, and Alaska now seeks to confirm that the State, and not the United States, possesses title to the lands underlying those navigable waters.

In recommending for the United States, the Special Master made critical errors of law that this Court—which considers the matter *de novo*—should not endorse. Most fundamentally, the Master committed a basic error of statutory interpretation in concluding that Alaska does not have title to the submerged lands underlying the area of Glacier Bay. Contrary to the recommendation, the plain language of the Alaska Statehood Act does not remotely manifest Congress' intent to retain such lands for the Federal government at statehood, much less the unequivocal intent required to upset Alaska's presumptive sovereignty over navigable waters within her boundaries. Moreover, contrary to the Master's recommendations on the other independent issues not already conceded by the United States, the remaining waters of the Archipelago are inland waters under this Court's precedents defining both historic waters and juridical bays.

Accordingly, the Court should grant summary judgment to Alaska on Counts I, II and IV of the Amended Complaint, and confirm the United States' disclaimer on Count III.

STATEMENT OF THE CASE

A. The Alexander Archipelago.

Southeast Alaska consists of a narrow strip of mountainous mainland and the Archipelago. The famed naturalist John Muir, who explored the area in 1879, described the waters of the Archipelago as "inland waters that are about as waveless as rivers and lakes." Ex. AK-1 at 13.[1] As he noted:

> In general, the island-bound channels are like rivers, not only in separate reaches as seen from the deck of a vessel, but continuously so for hundreds of miles in the case of the longest of them. The tide-currents, the fresh driftwood, the inflowing streams, and the luxuriant foliage of the out-leaning trees on the shores make this resemblance all the more complete. The largest islands look like part of the mainland in any view to be had of them from the ship * * *. [*Id.* at 17.]

As another explorer noted in 1873, the waters are "a labyrinth of straits, sounds and inlets * * *—a network of waters resembling inland lakes, majestic streams and small rivers—through which only the native and the most experienced trader know how to find their way." Ex. AK-2 at 26.

Europeans encountered Southeast Alaska in 1741, when the Russian Aleksei Chirikof sighted what would become Prince of Wales Island. After anchoring off the seaward side of Kruzof Island, he sent ship's mate Abram Dementief and a crew of ten around a protrusion of land. The men were never seen again. *See* Hubert Howe Bancroft, *History of Alaska 1730-1885*, at 68-71 (1886). The line these men crossed to meet their fate forms a sheltering boundary that has defined Southeast Alaska ever since. The closely-knit islands of the Archipelago form a barrier against the open sea and create a

[1] Exhibit references are to the exhibits to the parties' motions for summary judgment, which are lodged with the Court. Selected exhibits are also reproduced in the appendix ("App.") to this brief.

maze of protected marine water—an ideal environment for the fur-bearing marine animals that attracted the Russians, and the salmon and other fish that are the foundation of life and commerce in the area. For the indigenous inhabitants "[t]he numerous interconnected waterways of the region were the travel routes; a couple of trails connected the northern end of the inland waterway system with the Yukon River, but otherwise land travel was virtually unknown." Ex. AK-5. Indeed, the name of the major native group in Southeast—the Tlingits—means "tidal people." Ex. AK-6.

The marine waters of Southeast Alaska continue to be vitally important to the Alaskans who live there. Fishing provides the economic base for many Southeast towns. The important cruise ship industry is also obviously linked to the water and, in particular, the closely surrounding landscape. *See* Ex. AK-7. The towns of Southeast Alaska, including the State's capital, Juneau, generally are accessible only by boat or plane. The sounds, straits, canals, channels, and narrows of Southeast Alaska—known collectively and tellingly as the Inside Passage—still form its "roads." The state ferry system that travels these waters is aptly called the Alaska Marine Highway. Ex. AK-3 at 3; Ex. AK-4 at 6, 28; Ex. AK-7 at 1.

The waters of the Inside Passage are the historical, cultural, and commercial lifeblood of the region. They define Southeast Alaska. The State brought this original action to confirm that the land underlying these waters is in fact part of Alaska.

B. Alaska's Claims.

The Constitution reserves the submerged lands underlying navigable waters to new States to ensure that they join the Union on an "equal footing" with the original thirteen. *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 229-230 (1845). Title to these lands is "an inseparable attribute of the equal sovereignty guaranteed to [a new State] upon admission." *United States* v. *Louisiana*, 363 U.S. 1, 16 (1960). Implementing this doctrine, the Submerged Lands Act ("SLA") confirms Alaska's title to submerged lands three

nautical (geographical) miles seaward from the "coast line." 43 U.S.C. § 1312. The coast line is defined as both (1) "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea" and (2) "the line marking the seaward limit of inland waters." *Id.* § 1301(c). In this action, the State of Alaska seeks to confirm its title to three separate areas of lands located within the Archipelago, based in part on the "inland" status of the waters above them.

1. Glacier Bay. In Count IV of the Amended Complaint, Alaska seeks to confirm its title to the submerged lands underlying Glacier Bay, located near the northern end of the Archipelago.[2] These lands all lie within three miles of Alaska's coast line—however it is measured—and title to them would thus ordinarily vest with the State under the SLA. The United States contends, however, that Congress and the Executive unambiguously reserved these submerged lands for the Federal government before statehood. But there is a "strong presumption" that Alaska received title to these lands, and the Federal government cannot defeat that title "unless [its] intention was definitely declared or otherwise made very plain." *United States* v. *Alaska*, 521 U.S. 1, 34 (1997) (citation omitted). To prevail, the United States must show *both* that an Executive reservation clearly included submerged lands, *and* that Congress "explicitly recogniz[ed]" this reservation at statehood. *Id.* at 44-45.

Alaska contends that neither Congress nor the Executive expressed the requisite unambiguous intent to reserve the lands underneath Glacier Bay. In recommending for the United States, the Master found Congress' intent to defeat state title solely in Section 6(e) of the Alaska Statehood Act. That section provides in part that Federal lands in Alaska used for conservation and protection of the fisheries and wildlife of Alaska under the provisions of three specific

[2] The area around Glacier Bay is now a National Park, but at statehood it was designated a National Monument. Report at 227.

statutes shall be "transferred and conveyed to the State of Alaska by the appropriate federal agency." Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 343 (codified at 48 U.S.C. note prec. § 21) (App. 2a). A proviso to that section, however, states "[t]hat *such transfer* shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife * * *." *Id.* (emphasis added). Thus, under its plain language Section 6(e) transferred to Alaska certain Federal property used for fish and wildlife conservation under specific statutes, but exempted from such transfer a subset of those lands withdrawn or set apart as wildlife refuges or reservations.

As the Master noted, it is *undisputed* that Glacier Bay "does not fall within the ambit of § 6(e)'s main clause." Report at 267. Yet the Master interpreted the proviso as retaining lands, such as Glacier Bay, not otherwise covered by the main clause. *Id.* at 272. As shown below, that interpretation defies the plain language of the statute and the strong presumption of state title the law requires.

2. The "Pockets and Enclaves." Wholly apart from the Glacier Bay claim, Alaska seeks to quiet title to submerged lands that are more than three miles from the shores of the islands of the Archipelago but inside of the outer perimeter of the Archipelago formed by those islands, as well as lands three miles seaward of that perimeter. These include a checkerboard of "pockets" and "enclaves" of lands depicted on Appendix C to the Report. Because the islands are fewer than six miles from each other or the mainland at most but not all points, measuring the "coast line" only from the physical shores results in isolated "enclaves" of submerged lands that are more than three miles from any shore but entirely surrounded by lands less than three miles from shore. *Cf. Alaska*, 521 U.S. at 9. Such a measurement method (known as the "arcs-of-circles" method, *id.*) also yields "pockets" of lands that are more than three miles from any physical shore but within the outer perimeter of the Archipelago. The Uni-

ted States contends that this crazy quilt of isolated pockets and enclaves are Federal lands because they are more than three miles from any shore—even though many of those lands are completely surrounded by lands that indisputably belong to Alaska. Alaska, by contrast, has asserted two separate and distinct bases for its title to all submerged lands—including the pockets and enclaves—lying within or three miles seaward of the outer perimeter of the Archipelago.

a. Historic Inland Waters. In Count I of the Amended Complaint, Alaska asserts that the waters of the Archipelago, including the pockets and enclaves, were "historic inland waters" at statehood and thereafter, and that Alaska therefore possesses title to the submerged lands underlying them.

Historic inland waters are those over which the United States has continuously exercised authority with the acquiescence of foreign nations. *Id.* at 11. Here, Alaska presented evidence showing, *inter alia*, that both before and after statehood the United States unequivocally claimed the waters of the Archipelago as inland in an international arbitration and before this Court, that it used those claimed boundaries for discriminatory enforcement of fishing laws against foreign nations, that Russia had also taken steps to enforce the same boundaries, and that foreign nations understood and acquiesced to the claim. The Master nevertheless recommended granting summary judgment to the United States on this issue. Alaska takes exception to that recommendation.

b. Juridical Bays. Count II of the Amended Complaint alternatively alleges that Alaska has title to the submerged lands within the outer perimeter of the Archipelago, including the pockets and enclaves, because the waters qualify as "juridical bays" under Article 7 of the Convention on the Territorial Sea and Contiguous Zone ("the Convention"), Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205, T.I.A.S. No. 5639 (reproduced at App. 4a-5a).

This Court employs the geographic standards of the Convention to determine whether areas of water, including areas

more than three miles from a physical shore, are considered juridical bays subject to state jurisdiction. *See United States* v. *Louisiana* ("*Louisiana Boundary Case*"), 394 U.S. 11, 35 (1969). Alaska contends that when certain islands are properly "assimilated" to the mainland, such that they are legally considered part of that mainland, the waters of the Archipelago form two bays under the standards of the Convention. *See* App. 11a-17a. The Master recommended granting summary judgment to the United States on Count II as a matter of law because, in his view, the standards for assimilation for certain islands and one of the standards of the Convention were not met. Alaska takes exception to that recommendation.

3. The Tongass. In Count III of the Amended Complaint, Alaska sought to quiet title to the submerged lands within the general boundaries of the Tongass National Forest, which encompasses much of the Archipelago. Initially, the United States asserted that it retained title to all submerged lands within the Tongass that are less than three miles from the physical shores of the islands or the mainland. After Alaska moved for summary judgment on that issue, however, the United States capitulated. Rather than oppose that motion, the United States conceded that Congress had not expressed the requisite clear intent to defeat Alaska's presumptive title. Pursuant to 28 U.S.C. § 2409(a)(e), the United States then sought confirmation of a disclaimer of title to those submerged lands. The Master, over the objections of certain amici, recommended that the Court confirm that disclaimer and dismiss Count III for lack of jurisdiction as provided in Section 2409(a)(e). *See* Report at 276-294. Alaska urges the Court to adopt that recommendation.

C. Procedural Background.

On June 12, 2000, the Court accepted jurisdiction over Alaska's original complaint and referred the case to a Special Master for initial recommendation. On January 8, 2001, the Court granted Alaska leave to amend its complaint to include the alternative juridical bay count. On January 14, 2002, the

Court denied certain movants leave to intervene. The parties then conducted written discovery and filed a series of summary judgment motions before the Master covering every count of the Amended Complaint.[3] On March 30, 2004, without conducting a trial or hearing any testimony, the Master issued a final report recommending that the Court grant the United States' motions for summary judgment on Counts I, II, and IV, deny Alaska's motions for summary judgment, and confirm the United States' disclaimer relating to Count III. Alaska now urges the Court to overrule the recommendations as to Counts I, II, and IV, grant Alaska summary judgment on those counts, and confirm the disclaimer.

SUMMARY OF ARGUMENT

I. The Court should grant summary judgment to Alaska on Count IV. There is a strong presumption that Alaska received title to the submerged lands underlying Glacier Bay as an incident of her sovereignty, and this title cannot be defeated unless Congress manifested an unequivocal intent to do so. The Master erred in concluding that a proviso to Section 6(e) of the Alaska Statehood Act constitutes this unambiguous intent. The plain language of the proviso applies to a different category of lands that indisputably does *not* include Glacier Bay. And even if Section 6(e) were ambiguous on the point, such ambiguity could not defeat the State's title given the clear-statement rule that governs this issue.

II. The Court should grant summary judgment to Alaska on Count I. The Master wrongly discounted the United States' continual and unopposed public assertions of authority over the waters of the Archipelago, and rested his Report on erroneous interpretations of internal government documents that cannot repudiate those public claims. The United States explicitly claimed the waters as inland in the 1903

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[3] Alaska did not file a written motion for summary judgment on Count IV, but the Master recognized Alaska's oral motion on that count. *See* Report at 229. Alaska renews that motion here.

Alaska Boundary Arbitration. It consistently used the claim as the predicate for discriminatory fisheries enforcement against foreign vessels. The Alaska Supreme Court, shortly after statehood, found that the waters were inland. And the United States reiterated that position to this Court in a formal brief. Foreign nations not only understood that the United States claimed the waters of the Archipelago as inland; they relied on that claim in conducting their own international relations. And vital interests of the United States fortify the conclusion that the waters are historic inland waters.

III. The Court should alternatively grant summary judgment to Alaska on Count II because the waters of the Archipelago are juridical bays under Article 7 of the Convention. In *United States* v. *Maine*, 469 U.S. 504 (1986), the Court held that Long Island Sound is a juridical bay because Long Island is properly assimilated to the mainland. Under that precedent, the central block of islands in the Archipelago qualifies even more strongly for assimilation. And once that assimilation is recognized, the Archipelago comprises two juridical bays meeting all the standards of Article 7.

ARGUMENT

The Master heard no witnesses, conducted no trial, and made no findings of fact, but instead recommended granting summary judgment. Accordingly, the Court considers this case *de novo* to determine whether judgment is proper as a matter of law. *See Nebraska* v. *Wyoming*, 507 U.S. 584, 590 (1993). Indeed, even if the Master had engaged in factfinding, the Court's consideration in this original action would still be *de novo* upon an "independent review" of the record. *United States* v. *Maine*, 475 U.S. 89, 98 (1986); *United States* v. *Louisiana*, 470 U.S. 93, 101 (1985); *Louisiana* v. *Mississippi*, 466 U.S. 96, 102 (1984).

To evaluate motions for summary judgment in original actions, this Court applies Fed. R. Civ. P. 56 and the precedents construing that rule. *Nebraska*, 507 U.S. at 590. Under the rule, "[s]ummary judgment is appropriate when

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* Under this standard, Alaska is entitled to summary judgment on all counts not already conceded by the United States.

I. THE STATE HAS TITLE TO THE SUBMERGED LANDS UNDERLYING GLACIER BAY.

Title to lands underlying her navigable waters is "an inseparable attribute" of Alaska's sovereignty. *Louisiana*, 363 U.S. at 16. Thus, there is a "strong presumption against defeat of a State's title," and the Court "will not infer an intent to defeat a future State's title to inland submerged lands '*unless the intention was definitely declared or otherwise made very plain.*' " *Alaska*, 521 U.S. at 32-33, 34 (emphasis added; citation omitted). In *Alaska*, the Court confirmed that this clear-statement rule applies to offshore submerged lands, because such lands belong to the State under the SLA unless "expressly" retained by the United States. 43 U.S.C. § 1313(a). As the Court held, "[w]e cannot resolve 'doubts' about whether the United States has withheld state title to submerged lands beneath the territorial sea in the United States' favor, for doing so would require us to find an 'express' retention of submerged lands where none exists." *Alaska*, 521 U.S. at 35.

The United States asserts that it retained the lands underlying Glacier Bay—which would otherwise belong to the State under the SLA—through a pre-statehood executive reservation. To sustain this claim, the United States must show both that the executive reservation clearly includes submerged lands *and* that Congress "explicitly recogniz[ed]" this reservation at statehood. *Id.* at 44-45. *Accord Idaho* v. *United States*, 533 U.S. 262, 273 (2001). The United States has not carried its heavy burden because it has identified no statute evidencing Congress' explicit ratification.[4]

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[4] Although the Court need not decide the issue, Alaska also disagrees with the Master's conclusion that the Executive reservations establishing Glacier Bay National Monument clearly included submerged lands. *See* Report at 229-264. As Alaska has shown, the Monument's borders were drawn partly through water to denote islands and other uplands to be included, not to clearly include the submerged lands. *See* AK Opp. to Mot. for Summ. Judg. on Count IV at 3-11. Moreover, the failure to reserve the *entire* seabed would not have defeated the United States' asserted purposes for the reservation—studying glaciers, the small remnants of "interglacial forests," and flora and fauna; and preserving bears. *Id.* at 11-42. But because Congress never unambiguously ratified the purported reservation, the Court need not address whether the reservation clearly included submerged lands.

A. Section 6(e) Of The Statehood Act Expresses No Clear Intent To Retain Lands Under Glacier Bay.

The Master found that a single proviso, appended to Section 6(e) of the Alaska Statehood Act, constitutes the clear statement by Congress that is required for the United States to retain lands underlying Glacier Bay. The Master erred. The statute's plain language shows no intent to ratify such a reservation, much less the unambiguous intent the United States must prove to prevail. That is reason enough to grant the State summary judgment on Count IV.

The Statehood Act establishes a reticulated set of property-transfer rules specifying which sovereign gained title to which lands at statehood. To begin with, Section 5 sets a default rule that the United States retains title to all its property. Statehood Act § 5 (App. 1a). But that baseline standard contains an important qualification: "[e]xcept as provided in Section 6." *Id.* Section 6(m), in turn, provides that the State would receive all its rights to submerged lands under the SLA. *Id.* § 6(m). Thus, under Section 5 the United States retained title to the upland portions of Glacier Bay National Monument, while under Section 6(m) the State received title to the submerged lands (if any) within that reservation.

Section 6(e) addressed a narrow category of *other* property. It provides, in pertinent part:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 * * * and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 * * * and June 6, 1924 * * * shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: * * * *Provided*, That *such transfer* shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. [*Id.* § 6(e) (last emphasis added).]

The statute is clear on its face. The main clause transfers to the State a general class of property that the United States would have otherwise retained under Section 5: property of the United States used for fish and wildlife conservation under three listed statutes. This generalized exception to the Section 5 default rule that the United States retains title to its own property is immediately followed by a narrow proviso that sets forth an exception to the exception: "*such transfer* shall not include" lands withdrawn or set apart as wildlife refuges or reservations. The reflexive phrase "such transfer" is significant. It limits the reach of the proviso to "such transfer" already described in Section 6(e)'s main clause, thereby retaining for the United States a *subset* of the antecedent lands set forth in the main clause.

The proviso thus comes into play only if property would otherwise be covered by Section 6(e)'s main clause. That is dispositive here. For as the Master noted, it is *undisputed* that the lands underlying Glacier Bay "do[] not fall within the ambit of Section 6(e)'s main clause" because they were not used for fish and wildlife conservation under the designated statutes. Report at 267. The proviso therefore could not—and did not—ratify any reservation of those lands, because

the proviso's plain terms apply exclusively to an entirely different set of lands. It is impossible to interpret that proviso as nevertheless covering lands that are indisputably *not* included in "such transfer," much less expressing an unambiguous intent to ratify a reservation of lands not included. *See Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) (courts "presume that [the] legislature says in a statute what it means and means in a statute what it says there").

Indeed, the proviso would be superfluous as applied to U.S. properties, such as Glacier Bay, not covered by the main clause. In Section 4 of the Statehood Act, Alaska disclaimed all title to any property not affirmatively granted by the Act, and Section 5 reserved to the United States all federal lands *not* transferred to the State in Section 6. *See* App. 1a. These non-transferred lands included the uplands of the Glacier Bay Monument. Thus, it would not only be illogical, but also unnecessary, to interpret the proviso as applying to lands such as those in the Monument, which were already retained under another provision of the Act. The point of the proviso was to retain a subset of the lands that were *exempted* by Section 6(e)'s main clause from the Section 5 default rule.[5]

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[5] Unlike monument lands such as Glacier Bay, wildlife refuges were operated under laws specified in the statute. Orders reserving Alaska wildlife refuges expressly stated that they were created for purposes of the Alaska Game Law specified in Section 6(e). These include the orders creating the two largest reservations—the Kenai Moose Range, 6 Fed. Reg. 6471 (1941), and the Kodiak Wildlife Refuge, 6 Fed. Reg. 4287 (1941), which together comprised more than half the wildlife refuge land in Alaska before statehood. *See Hearings Before the Senate Comm. on Interior and Insular Affairs on S. 50 ("1954 Hearings")*, 83rd Cong. 64-65 (1954) (Ex. AK-452). These refuges were covered by the main clause because they were used by the United States for the "sole purpose of conservation and protection of the fisheries and wildlife of Alaska" under the cited laws. This clause conveyed property that the United States used solely for management of local fish and wildlife, rather than property it used even partially for federal management

The Master therefore erred in concluding that the proviso retains lands, including the Glacier Bay National Monument, that do not fall within the main clause. While it is possible, as a theoretical matter, for Congress to draft a proviso that operates independently of its main clause, *cf.* Report at 268-269, Section 6(e) was unquestionably not drafted that way.

But even if Section 6(e) were ambiguous, Alaska would still be entitled to summary judgment. Given the importance of these lands to state sovereignty and the strong presumption of state title, a court cannot construe a statute to restrict that title "unless [such an] intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words." *Utah Div. of Lands* v. *United States*, 482 U.S. 193, 198 (1987). By definition, an ambiguous statute cannot satisfy this clear-statement rule. *See Alaska*, 521 U.S. at 35 ("We cannot resolve 'doubts' about whether the United States has withheld state title to submerged lands"); *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) ("In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions * * *."). Under no circumstances can the traditional state-federal balance be disrupted in the obscure manner suggested by the Master.

B. The Statute's Purposes and Legislative History Show That It Does Not Cover Glacier Bay.

Although it is unnecessary to examine them given the clear-statement rule, Section 6(e)'s purposes and legislative history also show that the proviso was never intended to

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functions. Most of the other wildlife refuges in Alaska at statehood were for migratory birds, seals, and sea otters, *see id.* at 76, which were administered under federal laws relating to interstate commerce or international treaties and therefore did not fall within the main conveyance clause. But regardless of which precise properties were covered by the main clause, the statutory language still limits the property retained by the proviso to a subset of the property otherwise included in that conveyance clause.

apply to the lands underlying Glacier Bay. Section 6(e) addressed a specific concern: fish and wildlife management. Before statehood, the federal Fish and Wildlife Service ("FWS") managed these resources. Section 6(e) transferred to the State the property that FWS had used for local fish and wildlife management functions, except a specified portion of those properties that Congress felt FWS ought to retain.[6] There is nothing in the legislative history of Section 6(e) evincing an intent that the provision apply to other properties such as the Glacier Bay Monument—a National Park Service ("NPS") site indisputably not among the category of properties Section 6(e) would otherwise transfer to the State.

As the Senate Report on the Act stated about Section 6(e):

> Under Supreme Court decisions control over the fisheries and wildlife within its borders passes to a new State upon its admission as an incident of statehood. However, *the Fish and Wildlife Service* * * * has many valuable installations which have been effectively furthering the long-range interests of this great natural asset of the Territory and under this section the Territory gets the equipment that will be necessary for the State to carry on the work for which the Federal Government has been responsible. *Specifically excepted from the grant* are wildlife refuges. [S. Rep. No. 83-1028 at 31 (1954) (Ex. AK- 451) (emphases added).]

The legislative history confirms what the statute so clearly provides: that the wildlife refuges referred to in the proviso are a "specific[ ] except[ion]" to the grant of FWS property conveyed by the main clause.

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[6] The "appropriate federal agenc[ies]," App. 5a, that were to convey the property under the main clause are those within FWS that implemented the cited laws, the Bureau of Commercial Fisheries, the Bureau of Sport Fisheries and Wildlife, and the Alaska Game Commission. *See* 25 Fed. Reg. 33 (1960) (Ex. AK-450).

Congress added the proviso to the Statehood bill in 1950 at the request of Interior Secretary Chapman, who wanted to divide property and functions between the State and FWS. Previously, the draft section was broad enough to give the State all FWS property in Alaska. *See Hearings Before the Senate Comm. on Interior and Insular Affairs on H.R. 331 and S. 2036*, 81st Cong. 49 (1950). While Congress wanted the new State to assume local fish and wildlife management, it also wanted FWS to retain federal functions such as implementing laws relating to international treaties or interstate wildlife—particularly seals, sea otters, and migratory birds. With the new proviso, the amended conveyance clause of Section 6(e) stated that the State would get only the property related to its new functions—local fish and wildlife management—but not that related to the continuing federal functions. *Id.* The proviso assured that FWS would retain its wildlife refuges, even those that it had managed under the statutes of general application cited in the conveyance clause.

Thus, the proviso's purpose was to *exclude* from the conveyance wildlife refuges for local fish and game that FWS administered and wished to retain. This was necessary because management of local fish and wildlife is a traditional police power of the states. *See Baldwin* v. *Fish & Game Comm'n of Montana*, 436 U.S. 371, 391 (1978); *Carey* v. *South Dakota*, 250 U.S. 118, 120 (1919). FWS was concerned that without a proviso Section 6(e) would convey wildlife refuges that FWS wanted to keep, particularly the Kenai Moose Range and Kodiak Wildlife Refuge. In Senate testimony, FWS regional director Clarence Rhode expressed concern that if the Kenai Range were not excepted from the conveyance, the new State might compromise the purposes of that wildlife refuge. *See 1954 Hearings* at 67 (*"Senator Cordon*: I take it that you think that there is quite a little bit that probably [the State] would not do [if the Range were conveyed]. *Mr. Rhode*: That is what I am afraid would be the case.") (Ex. AK-452). When asked what properties the State would administer under Section 6(e), Rhode replied

"[a]ll of the wildlife and fisheries of Alaska, *other than these national refuge areas* [*e.g.*, Kenai and Kodiak]. That is what the bill provides. That would be 99 percent of the administration of game and fish." *Id.* at 70-71 (emphasis added).

There was no indication that Section 6(e) applied to anything other than FWS properties. To the contrary, when asked about wildlife refuges in connection with Section 6(e), Rhode testified that Alaska had 26 refuges totaling about 8,000,000 acres. *Id.* at 64. He clearly was not referring to any NPS reservations, because upon hearing that figure, a Senator remarked that these refuges exceeded the total acreage under NPS jurisdiction in Alaska. *Id. See also* Ex. AK-453 at 422. Rhode discussed the Kenai Range, *1954 Hearings* at 65-66, the Kodiak Refuge, *id.* at 72-74, the reservation of the Aleutian islands, *id.* at 69, and a musk ox reservation, *id.* at 75, and stated that the remaining retained refuges were "small areas." *Id.* Rhode testified that under proposed Section 6(e) these game refuges would not be turned over to the State. *Id.* at 71. No mention was made of any park or monument areas as falling within the provision. In fact, the NPS Director had testified about Glacier Bay National Monument immediately before Rhode, yet neither he nor the Senators ever mentioned Section 6(e). *Id.* at 46-55.

Thus, the legislative history confirms that the proviso was never intended to apply to lands, including Glacier Bay, not otherwise covered by the main clause.

C. The Court In *Alaska* Did Not Hold That Section 6(e)'s Proviso Is Independent Of Its Main Clause.

The Master based his recommendation in part on a misinterpretation of this Court's holding in *United States* v. *Alaska*, 521 U.S. 1 (1997). There, the Court held that Congress' express retention of wildlife refuges in the proviso to Section 6(e) evinced a clear statement of intent to retain all refuge lands—submerged and upland—covered by the proviso. *Id.* at 55-61. But contrary to the Master's view, *see* Report at 271-272, nothing in *Alaska* holds that the proviso is

divorced from the main clause of Section 6(e). In fact, the Court expressly presumed the opposite.

In *Alaska*, the Court held that submerged lands within the Arctic National Wildlife Range ("ANWR") were expressly retained under the proviso to Section 6(e). The Master noted that the Court in *Alaska* "assumed * * * that the Range would fit within the scope of the main clause of § 6(e) but for the proviso," and therefore "did not need to address the specific argument whether § 6(e)'s proviso could reserve lands that did not otherwise fit within the scope of § 6(e)'s main clause." Report at 270. But in holding that the proviso covered ANWR lands, the Court remarked that "[u]nless all lands—submerged lands and uplands—covered by the [ANWR reservation] application were 'set apart' within the meaning of the proviso to § 6(e), *they would have passed to Alaska under the main clause of § 6(e)*." *Alaska*, 521 U.S. at 60-61 (emphasis added). Thus, the Court expressly assumed that ANWR lands would have been covered by the main clause but for the proviso.[7] The Court certainly did not decide that the proviso could apply to lands *not* covered by the main clause, and in fact presumed the opposite.

The Master nevertheless opined that *Alaska* addressed the issue because the decision "treated the proviso as an independent retention clause, not merely as a limitation on a transfer clause." Report at 272. This reasoning is flawed. *Alaska* did treat the proviso as a retention clause: it held that the United States retains all lands covered by the proviso.

[7] It is immaterial to this case whether that assumption was correct. But under the reasoning of *Alaska*, ANWR would have been covered by the main clause. Unlike Glacier Bay, ANWR had not yet been created at statehood, but the Court held that it fell within the proviso because it had been set apart for a possible *future* wildlife refuge. *Id.* at 60. Under that reasoning, ANWR would have been covered by the main clause because it could eventually have been used for the purposes specified in that clause.

Specifically, the Court disagreed with the State's argument that even if ANWR were covered by the proviso, that would simply exempt it from the transfer clause, with the result that the submerged lands would not be retained and would instead pass to the State under Section 6(m). *Id.* at 271-272. Thus, the Court held that the proviso is a retention clause that trumps Section 6(m) for the property covered by the proviso. But while the Master was correct that "the Court decided that § 6(e)'s proviso itself may retain the property it describes," *id.* at 272, that entirely begs the question of what property it describes. In *Alaska*, the Court held that ANWR was covered by the proviso—and therefore was retained by the United States—because ANWR would otherwise be covered by the main clause. Here, by contrast, it is *undisputed* that Glacier Bay is *not* covered by the main clause. Thus, it was not retained by the proviso, and any contrary conclusion goes far beyond what the Court said or suggested in *Alaska*.[8]

D. Glacier Bay National Monument Was Not A Reservation For The Protection Of Wildlife.

In any event, even if the proviso unambiguously retained title to lands "withdrawn" or "set apart" as "reservations for the protection of wildlife," Alaska would still be entitled to summary judgment because Glacier Bay was not such a reservation. The Master found otherwise by relying on 16 U.S.C. § 1, the provision of the Antiquities Act that gives NPS general authority to regulate national monument lands. In his view, because Glacier Bay National Monument had

[8] Even if the Court *had* assumed the proviso was independent of the main clause, that unexamined assumption would not bind the Court here. *See Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) ("since we have never squarely addressed the issue, and have at most assumed the applicability of [the standard], we are free to address the issue on the merits"); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (issue "not * * * raised in briefs or argument nor discussed in the opinion of the Court" is not *stare decisis*); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

wildlife in it, under 16 U.S.C. § 1 it was "set aside as [a] refuge[] or reservation[] for the protection of wildlife" within the meaning of Section 6(e)'s proviso. *See* Report at 273.[9]

The Master erred. Although the Antiquities Act broadly states that monuments have as a fundamental purpose the conservation of scenery, natural and historic objects, and wildlife, that statute is a general grant of regulatory authority, not a statement of the primary purpose of *every* reservation. Some monuments may have the primary purpose of protecting animals that are "objects of scientific interest," *Cappaert* v. *United States*, 426 U.S. 128, 142 (1976) (Devil's Hole pupfish), while others may be intended to preserve a historic site. Not every monument that contains wildlife was "set aside" to protect it. For example, the existence of birds at the historic Fort Sumter National Monument does not mean that this land was "withdrawn or set aside" as a "refuge[] or reservation[] for the protection of wildlife." Each monument's purposes are specific to its particular reservation.[10]

The United States created the Glacier Bay National Monument because, in the words of the 1925 proclamation establishing it, "[t]his area presents a unique opportunity for the scientific study of glacial behavior and of resulting move-

9 The law grants NPS the authority to regulate the use of monuments, "by such means and measures as conform to [their] fundamental purpose * * *, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same * * *." 16 U.S.C. § 1.

10 Although NPS regulations prohibited hunting in *all* monument lands, Ex. AK-379, that does mean that every monument was "withdrawn" as a "reservation[] for the protection of wildlife," even where, as here, the requisite "object of scientific interest" was not an animal. *Cf. Cappaert*, 426 U.S. at 142. In fact, hunting was *permitted* in the Kenai Moose Range and the Kodiak Wildlife Refuge, which without question were included in Section 6(e)'s proviso. *See 1934 Hearings* at 65 (Ex. AK-452).

ments and development of flora and fauna and of certain valuable relics of ancient interglacial forests." Ex. AK-361 at 1.[11] The Master found that the study of "fauna" that developed as glaciers receded "necessarily embraced its preservation." Report at 274. A purpose of the monument was to permit scientists to *study* how flora and fauna develop upon barren land that is exposed as glaciers retreat. The fauna might be protected as an incident of such study, but that does not make protecting wildlife the purpose of the monument as intended by Section 6(e). And given that the Master had to divine this purpose by extrapolating from the 1925 and 1939 proclamations as informed by the general NPS regulatory authority, *id.* at 273-276, it cannot be said that Section 6(e) constitutes the requisite *unambiguous* intent to ratify.[12]

For all these reasons, the Court should grant summary judgment to Alaska on Count IV of the Amended Complaint.

11 The 1939 proclamation adding lands to the Monument was worded similarly. *See* Ex. AK-382. And the letter from the Interior Secretary forwarding the proclamation stated only that the area to be added "present[ed] an exceptional opportunity for the study of glacial action and post-glacial ecology." Ex. AK-384.

12 Indeed, in 1939 there was, at a minimum, serious doubt within the Executive as to whether the Antiquities Act even allowed national monuments for the purpose of preserving wildlife. *See* Ex. AK-385 (1936 Justice Department opinion that statute was meant "to preserve individual objects rather than to preserve species"); Ex. AK-386 at 2 (1937 Justice Department memorandum noting prior opinion "that a monument could not, in any event, be established for the protection of animals"). As late as *1949*, a national monument proclamation was revised because of this view that "the Antiquities Act did not permit establishment or enlargement of a national monument to protect plant and animal life." *United States* v. *California*, 436 U.S. 32, 34 n.5 (1978). Regardless of whether this view "ever became official government policy," Report at 262, the lack of clarity on the point further shows that Section 6(e) did not *unambiguously* retain Glacier Bay.

II. THE WATERS OF THE ARCHIPELAGO ARE HISTORIC INLAND WATERS.

In Count I of the Amended Complaint, Alaska contends that it has title to the submerged lands underlying the waters of the Archipelago, including the pockets and enclaves, because the waters are "historic inland waters." To establish this title, "the State must demonstrate that the United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations." *Alaska*, 521 U.S. at 11. The Court also considers the "vital interests of the United States." *Alabama & Mississippi Boundary Case*, 470 U.S. 93, 103 (1985). The waters of the Archipelago satisfy all these requirements.

A. The United States Continuously Exercised Authority Over The Waters Of The Archipelago.

1. The United States Claimed The Waters As Inland From At Least 1903 Until 1971.

The Master correctly noted that the United States claimed the waters of the Archipelago as inland at the 1903 Alaska Boundary Arbitration. *See* Report at 56-57. In that international proceeding, the United States described the "political coast line" of Alaska as running along the *outside* of the islands and crossing each of the entrances, and described the boundary in precise detail. Ex. AK-26 at 31-32. As the United States made clear, "*[t]he boundary of Alaska—that is, the exterior boundary from which the marine league is measured—runs along the outside edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands.*" Ex. AK-8 at 15 (emphasis added). This Court long ago recognized the significance of this claim, holding that it was an example of the United States' then-extant "publicly stated policy" of claiming as inland areas of water enclosed by headlands less than ten miles apart. *Alabama & Mississippi Boundary Case*, 470 U.S. at 106-107 ("This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903.").[13]

The Master rightly rejected the United States' argument that these assertions of sovereignty were merely hypothetical musings of counsel, concluding that "the United States clearly defined the political coast line of Southeast Alaska and explained the character of waters lying behind this political coast line" and that the "the United States was expressing a considered analysis of the area." Report at 61. And he rightly recognized this Court's holding that statements of counsel for the United States—even in a brief in a case to which no foreign nation was a party—can notify foreign nations of a historic waters claim. *Id.* at 117. *See Alabama & Mississippi Boundary Case*, 470 U.S. at 108-109.

But the Master incorrectly opined that the 1903 assertions could not have made foreign nations, other than Britain, aware of the claim. Report at 118. The evidence shows otherwise. Even distant Norway knew of and affirmatively relied on the U.S. claim to the Archipelago in making a similar claim in its 1951 *Fisheries Case* dispute with Britain. *See* Ex. AK-82 at 162-163. Thus, as this Court has *already* held, there is "*no doubt* that foreign nations were aware that the United States had adopted [the] policy" applied in 1903 because "the United States' policy was cited and discussed at length by both the United Kingdom and Norway in the celebrated *Fisheries Case*." *Alabama & Mississippi Boundary Case*, 470 U.S. at 107 (emphasis added). Norway noted that

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[13] This 10-mile rule was not the only general policy advanced by the United States during at least part of this period. *See Alaska*, 521 U.S. at 11-21. But, as the Court has held, the general 10-mile rule can support a finding of inland status where, as here, it is "coupled with specific assertions of the status of the [area] as inland waters." *Alabama & Mississippi Boundary Case*, 470 U.S. at 107. As this Court has recognized, *id.* at 106-107, and as discussed below, the general 10-mile inland waters rule was expressly applied to the waters at issue here.

the United States had "stressed the notion of the 'outer coast line' " in 1903, and quoted from the United States' claim, including its description of the "outer coast line" of Alaska as running along the outside of the Archipelago. Ex. AK-82 at 218-219. Britain, for its part, sought to distinguish Norway's situation but never denied the validity of the U.S. claim. Ex. AK-83 at 154-155. And Britain's admitted understanding is, in fact, the most pertinent for this case since Britain was then the foreign nation most directly affected by the Alaska claim given its sovereignty over neighboring Canada.

The 1903 claim, moreover, was not an isolated event. To the contrary, the waters of the Archipelago continued to be characterized as inland well beyond statehood. As the Master noted, shortly after statehood both the trial court and the Alaska Supreme Court expressly found that the waters of the Archipelago were historic inland waters. *See Metlakatla Indian Community* v. *Egan*, 362 P.2d 901, 926-927 & n.112 (Alaska 1961); Report at 89-96. And the United States *itself* confirmed in a 1964 brief to this Court that the claim had been made and was still valid.[14]

Although the Master dismissed this public assertion as a "mistaken" policy, Report at 124, such statements to this Court are the exact kind of evidence this Court has held will confirm to foreign nations that the United States has made a historic waters claim. *See Alabama & Mississippi Boundary Case*, 470 U.S. at 106-107 (statement in brief can put foreign nations on notice of historic waters claim).[15] Thus, this

[14] *See* Ex. US-I-6 at 130-131 (statement to Court that a strait leading to inland waters "is treated as a bay" and that "[e]xamples" of such bays "include the straits leading into the Alaskan Archipelago"); *id.* at 89 ("Another instance where the United States applied the ten-mile [closing line] rule to its own coast occurred in the Alaska boundary arbitration of 1903.").

[15] It is unlikely that this stated position was a "mistake," as it was made in an exhaustive review of the United States' maritime

Court was correct in holding that the 1903 claim was an example of a "publicly stated policy of the United States." *Id.* In any event, to establish historic waters "it is necessary to prove only open and public exercise of sovereignty, not actual knowledge by the foreign governments." *Id.* at 110.

Not until *1971* did the United States make an about face and, for the first time, publish charts showing the supposed "pockets and enclaves" of high seas within the Archipelago. *See* Report at 109-114. But as the Court held with respect to Mississippi Sound in the *Alabama & Mississippi Boundary Case*, 470 U.S. at 112, such a disclaimer came far too late to defeat the State's vested title to the lands at issue here.

2. The United States Consistently Based Enforcement Actions Against Foreign Vessels On Its Claim To The Waters of the Archipelago.

This continuous assertion of sovereignty was not an empty gesture; rather, the United States consistently used its claim to the waters of the Archipelago as the predicate for discriminatory enforcement authority against foreign vessels. Under both this Court's precedents and international law, such an enforcement regime represented an affirmative assertion of sovereignty confirming the Archipelago as historic waters.

a. The 1906 Alien Fishing Act prohibited foreign, but not domestic, commercial fishing "in any of the waters of Alaska." 34 Stat. 263. In 1924, the United States intercepted the Canadian vessel *Marguerite* for violating that Act in one of the "pockets" that the United States now argues were international waters at the time. Ex. AK-33; Exs. AK-461, AK-462 (App. 9a-10a). Britain complained that the seizure occurred "approximately five and one-half (5 1/2) miles from the nearest United States territory," in what it said were international waters. Ex. AK-34. The United States nonethe-

delimitation policy. *See* Ex. US-I-6 at 49-141. But the key point is that the United States characterized the waters of the Archipelago as inland, not the stated rationale for that characterization.

less responded that the *Marguerite* was seized in waters "within the jurisdiction of this Government." Ex. AK-35 at 1-2. Britain did not pursue the matter further. Report at 132.

This action was not an aberration but rather an application of settled Federal enforcement policy that remained until 1971. In the 1920s, regulations declared that the Alien Fishing Act would be enforced in *all* waters of the Archipelago. *See* Ex. AK-36 at 19, 20-23 (1926 regulations applying Act to "[a]ll waters" between Dixon Entrance and Yakutat Bay); Ex. AK-37 at 26 (1928 regulations). In 1930, the federal Bureau of Fisheries informed Alaska enforcement officials that "Interior coastal waters cease to be International waters at and above [the] place where distance from headland to headland is less than ten nautical miles," Ex. AK-39—the same boundaries the United States claimed in 1903. Federal regulations in place from 1950-1956, *see* Exs. AK-52 to AK-58, were interpreted as applying to all waters within the Archipelago and three miles seaward of the headland-to-headland closing lines. Ex. AK-59 at 1; Report at 71. In 1956, that interpretation was adopted as a formal regulation. Ex. AK-60. Later testimony before Congress showed that from 1946-1968 "there was no foreign fishing allowed" within the jurisdiction of the 1956 regulations. *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries: Hearing Before the Senate Comm. on Commerce* ("*1972 Hearing*"), 92d Cong. 25-26 (1972) (Ex. AK-38).[16]

Thus, even after statehood, the Federal government continued to assert enforcement authority against foreign vessels in

[16] Later State Department studies described this as the "[a]doption by United States of straight baseline method in measuring limits of territorial waters in Alaska," and noted that the regulations "made clear * * * that [the] obligation to control fishing in the high seas * * * did not extend to waters inside a belt of three miles measured from lines drawn between islands adjacent to the coast of Alaska." Exs. AK-31 at 25-26, AK-61 at 19-20, AK-62 at 13-14.

all the waters of the Archipelago, including the pockets and enclaves the United States says were high seas at the time. In 1959, State Department Geographer Pearcy prepared maps of the Archipelago that used closing lines similar to those adopted in 1903. *See, e.g.*, Ex. AK-103. The clear weight of evidence shows that the charts, although unofficial, were relied on by the Federal government to enforce fisheries laws against foreign vessels. *See* Exs. AK-104, AK-105 at 15e (Coast Guard and Interior Department statements). In 1964, the Interior Department stated that "Dr. Pearcy's boundaries * * * were determined adequate basis for the purposes of law enforcement upon foreign nationals." AK-106 at 20e. Likewise, it "was made known to the State Department that the charts will be used for enforcement purposes and therefore may serve as the basis for action by United States patrol vessels against foreign nationals." Ex. AK-107 at 17e. Indeed, the charts became "standard reference" for federal officials in Alaska. *1972 Hearing* at 17 (Ex. AK-38).

b. In brushing aside this evidence of continuous enforcement authority against foreign vessels, the Master made two errors, one factual and one legal. *First*, he incorrectly opined that "[t]he record does not establish with clarity where the Coast Guard seized the *Marguerite*." Report at 67-68. *See id.* at 119. The Master overlooked undisputed evidence—a contemporaneous Coast Guard map—that plotted precisely where the *Marguerite* was intercepted, in an area unquestionably more than three miles from land. *See* Ex. AK-461 (map showing location), App. 9a-10a (location with reference to three-mile limit) (Ex. AK-462); Reply in Supp. of AK Mot. for Summ. Judg. on Count I at 20-21.[17] Thus, the United States and Britain agreed that the incident took

[17] The Coast Guard initially described the seizure as having occurred at a non-existent location. *See* Ex. AK-33; Report at 67-68. It later prepared a map, however, pinpointing the precise location of the interception. *See* App. 9a-10a (Exs. AK-461, AK-462).

place more than three miles offshore. This enforcement action and Britain's acquiescence to it, considered in light of the consistent U.S. policy, demonstrate that the United States did not deviate from its claim to the Archipelago's waters.

Second, the Master erred in opining that it was "immaterial" whether the United States enforced fishing regulations against foreigners in areas it now claims were high seas at the time. Report at 120. In *United States* v. *Alaska*, 422 U.S. 184 (1975) ("*Cook Inlet*"), the Court focused on the seizure by Alaska state officials of Japanese vessels for fishing in an area asserted to be historic waters. The Court held that the incident "deserve[d] scrutiny *because the seizure of a foreign vessel more than three miles from shore manifests an assertion of sovereignty to exclude foreign vessels altogether*" and, therefore, such an assertion "must be viewed * * * as an exercise of authority over the waters in question as inland waters." *Id.* at 201, 202 (emphasis added). The Court ultimately did not find the incident determinative, but only because "the United States neither supported nor disclaimed the State's position" and Japan, rather than acquiescing, "never acceded to the position taken by Alaska." *Id.* at 203. By contrast, the United States, not the State, seized the *Marguerite* in accord with its longstanding publicly announced policy, and (as noted below) Britain did accede to that position.

Cook Inlet correctly states the law. U.S. regulation of fishing by its own nationals in waters does not show that the waters are inland "for the United States can and does enforce fish and wildlife regulations against its own nationals, even on the high seas." *Id.* at 198. And *non-discriminatory* enforcement in an area—*i.e.*, "afford[ing] foreign vessels the same rights as were enjoyed by American ships"—is also not determinative because there is a "limited circumscription of the traditional freedom of fishing on the high seas * * * based, in part, on a recognition of the special interest that a coastal state has in the preservation of the living resources in the high seas adjacent to its territorial sea." *Id.* at 198-199.

But *discriminatory* enforcement—forbidding foreigners, but not U.S. nationals, to fish in an area—is an assertion of authority to exclude foreign vessels that gives rise to historic inland water status. Indeed, as explained in a United Nations study relied on by the United States in this case:

> Suppose * * * the [nation] has continuously asserted that its citizens had the exclusive right to fish in the area, and had, in accordance with this assertion, kept foreign fishermen away from the area or taken action against them. In that case the State in fact exercised sovereignty over the area, and its claim, on a historical basis, that it had the right to continue to do so would be a claim to the area as its "historic waters." [Ex. US-I-4 at 13-14.]

In *Cook Inlet*, the Court relied on the absence of evidence that the Alien Fishing Act was applied against foreigners in the area at issue. Here, by contrast, there is clear evidence that the United States asserted the authority to, and did, enforce the Act in all the waters of the Archipelago. This assertion of authority to exclude foreign vessels, when considered in light of the United States' well-known claim to the waters, easily satisfies the first prong of the historic waters inquiry.

3. The United States' Claim Is Consistent With Russia's Prior Claim.

The United States' claim to the waters of the Archipelago was a continuation of Russia's similar claim, to which the United States succeeded when it purchased Alaska. In 1824, Russia granted American mariners a ten-year treaty right, which they otherwise would not have possessed, to "frequent * * * interior seas, gulphs, harbours, and creeks [*i.e.*, small bays]" upon the coast of Alaska for the purpose of fishing and trading with the natives. 8 Stat. 304 (1825). The Master opined that this treaty showed only Russia's claim to waters within a three-mile "cannon shot" of shore, Report at 27-30, but the record, when examined in proper context, shows that the Russian claim extended to the entire Archipelago.

After this treaty expired, Russia took "active steps to exclude foreign traders from the 'Straits.' " Ex. AK-13 at 69. These steps included stationing the brig *Chichagoff* at the "southern boundary line" of the Archipelago (near the current border with Canada) to "intercept[] foreign vessels entering the inland waters of the colony." *Id.* at 70. The United States' *own* expert characterized this action as "a Russian blockade." Ex. US-I-2 at 22. Indeed, it was noted at the time that "the Russians had a ship in southern boundary waters 'watching their lines that they might not be encroached upon.' " *Id.* (citation omitted). And in 1836, the *Chichagoff* informed the British Hudson's Bay Company that one of its vessels "was forbidden to travel to Sitka by way of the interior channels." *Id.* at 24 (Russian ship described as the "*Chitsekoff*"). Also in 1836, Russia boarded the American vessel *Loriot* outside of a harbor and "ordered [it] to leave the waters of His Imperial Majesty," thereby forcing it to return to Hawaii. Report at 35 (quoting Ex. AK-11).[18]

The Master discounted this evidence, opining that the 1824 treaty was unclear as to the "interior seas" it covered, *id.* at 25-28, that the expulsion of the *Loriot* may have been only from a "cannon shot" zone off shore, *id.* at 33-37, and that the *Chichagoff* merely provided mariners with notice that the treaties had expired without blocking passage. *Id.* at 33. But as noted, the United States' *own* expert, relying on contemporaneous sources, described the *Chichagoff* as a "Russian blockade," that was "watching their lines" and that had "forbidden" a vessel from traveling to Sitka, which lies on the Archipelago's outer coast, "by way of the interior channels." And the Master merely speculated that Russia was enforcing a three-mile "cannon shot" zone when it repelled the *Loriot*, since no account of the incident was so limited. Thus,

[18] In 1834, Russia had also barred the British vessel *Dryad* from proceeding up the Stikine River, on the ground that the British " 'had no right to navigate these Straits.' " Ex. US-I-2 at 18.

regardless of any ambiguity regarding which waters were covered by the 1824 treaty, the evidence as a whole shows that Russia claimed the entire Archipelago as its own, just as the United States would do when it succeeded to the territory.

As the Master noted, the historic waters test would be satisfied if Russia and the United States continuously exercised authority over the Archipelago from 1824. *See* Report at 131 n.37. As shown, ample evidence supports that finding. But even ignoring Russia's actions, the United States' own continuous 68-year claim from 1903 to 1971 is more than sufficient to establish the area as historic waters.[19] Contrary to the Master's tentative view (Report at 131) the United States has claimed historic waters based on a far shorter time period. As the United States has admitted, it first claimed Chesapeake Bay as inland waters in 1885, and the Bay was listed among the world's historic inland waters in 1927, only 42 years later. *See* Ex. AK-307 at 15.

4. The Evidence Relied On By The Master Does Not Support His Recommendation.

The Master based his contrary recommendation on four scattered pieces of evidence. *See* Report at 109-114. None of this evidence counteracts the continuous, public assertions of sovereignty made by both the United States and Russia.

First, the Master relied on an 1886 letter from Secretary of State Bayard to the Treasury Secretary. *See id.* at 109-110; Ex. US-I-6 at 14a-17a. The letter is hardly probative here, since it was internal correspondence that primarily addressed a dispute on the East coast and did not announce to any for-

[19] Statehood is generally the point at which title to submerged lands passes to the states, thereby preventing the Federal government from divesting that title. But if the status of the Archipelago as historic waters did not ripen until between 1959 and 1971 (when the United States attempted to disclaim title), Alaska would still retain title. *See Alabama & Mississippi Boundary Case*, 470 U.S. at 106-110 (relying on post-statehood evidence to find state title).

eign nation that the United States had abandoned a claim to the Archipelago. But in any event, the letter specifically refers to the United States' "own claim to a jurisdiction over territorial waters on the northwest coast beyond the three-mile zone," *id.* at 13a-14a, thereby confirming that the claim existed. And the historical evidence negates any inference that this letter confirmed a universal U.S. practice of never claiming as inland those waters enclosed by headlands more than six miles apart. To the contrary, there are many prior statements—some referenced in Bayard's letter—making clear that the United States had claimed such jurisdiction.[20] Indeed, a strict three-mile rule in 1886 would have defeated the United States' claims to Delaware Bay, Chesapeake Bay, Long Island Sound, and Mississippi Sound, all of which are more than six miles across, yet are recognized as historic inland waters. *See* Report at 13 & nn.10, 11.

Second, the Master referenced 1934 correspondence from the Secretary of Commerce to the Secretary of State. *See* Report at 70-71, 110; Ex. US-1-14. Once again, this internal correspondence put foreign nations on notice of nothing. And in any event, the correspondence simply notes that Canadian fishermen may fish outside the three-mile limit north of the line dividing the United States from Canada. *Id.*

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[20] *See, e.g.*, Ex. AK-84 (1793 Attorney General opinion that nation owns waters surrounded by its lands); Ex. AK-85 at 2, 3, 5, 7 (1793 and 1796 statements that three-mile limit does not apply to "land-locked" waters); *Extent of the Marginal Sea* 641 (Henry G. Crocker, ed. 1919) (1804 Thomas Jefferson statement that "wherever you can see from land to land all the water within the line of sight is in the body of the adjacent country" and the three-mile limit is measured from this "line of sight"); Ex. AK-87 at 129 (1849 statement that offshore jurisdiction extends to parts of the sea enclosed by headlands); Ex. AK-89 at 3 (letter to Spain recognizing that three-mile jurisdiction around Cuba was measured from fringing islands); *Mahler* v. *Norwich & New York Transp. Co.*, 35 N.Y. 352, 355-356 (1866) (islands enclose inland waters).

See Report at 70-71.[21] Nothing in these letters clearly states that the three-mile limit was not to be measured according to the headland-to-headland line clearly claimed 1903.

Third, the Master noted that no published list of the world's historic waters includes the Archipelago. *See id.* at 111. But even the Master recognized that inclusion in such a list "is not a requirement under the Court's precedents," and that the Court held Mississippi Sound constituted historic inland waters even though it does not appear on such a list. *Id.* Such lists of necessity only give examples of historic waters, for there would be insurmountable difficulties in trying to prepare a definitive list. *See* US-I-4 at 23-24.

Finally, the Master relied on the United States' 1971 disclaimer. *See* Report at 112-114. But the 1971 disclaimer is of no moment because for all the reasons set forth above Alaska's title ripened *before* the disclaimer. In the *Alabama & Mississippi Boundary Case*, 470 U.S. at 112, the Court held that a similar 1971 disclaimer could not defeat a state's historic title that had ripened earlier. The same is true here.

B. Foreign Nations Acquiesced To The Claim.

"[W]hen foreign governments do know or have reason to know of the effective and continual exercise of sovereignty over a maritime area, inaction or toleration on the part of the foreign governments is sufficient to permit a claim of historic title to arise." *Id.* at 110. Here, the evidence of acquiescence is even clearer, for not only did foreign governments know of and tolerate the United States' claim to the waters of the Archipelago, they affirmatively agreed with it and cited it in support of their own maritime claims.

As noted, in the 1951 *Fisheries Case* Norway affirmatively relied on the United States' claim to the waters of the Archipelago in pressing its own case. *See supra* at 23-24.

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[21] The referenced line was the so-called "AB" line, which was established at the 1903 boundary arbitration. *See* Report at 75.

Far from registering disagreement, Britain assumed the validity of that claim, arguing instead that the U.S. claim did not validate Norway's claim because the U.S. baseline approach was limited "to cases where the interior waters are genuinely enclosed by the configurations of the island groups." Ex. AK-83 at 154. Moreover, in the 1910 Atlantic Coast Fisheries Arbitration, Britain cited several examples of the U.S. practice of claiming enclosed waters as inland, including the claim to the Archipelago made at the 1903 Alaska Boundary Arbitration. *See, e.g.*, Ex. AK-80 at 83-86. And importantly, Britain acquiesced to the 1924 *Marguerite* seizure by failing to pursue its protest after having been informed that the vessel was intercepted in U.S. waters.

The Master incorrectly discounted this evidence. He noted the absence of any formal statement that foreign nations would acquiesce in the exclusion of their vessels from the pockets and enclaves. Report at 132. But that is not the standard; "inaction or toleration" is all that is required to show acquiescence. *Alabama & Mississippi Boundary Case*, 470 U.S. at 110. The Master opined that foreign nations did not know of the United States' claim, Report at 132, but that assertion is incorrect as noted above. Foreign nations not only knew of the claim; they relied on it in conducting their own foreign affairs. The Master asserted that Britain did not acquiesce in the *Marguerite* seizure because fishing enforcement does not bear on the historic waters inquiry, and because "Britain ultimately let the matter drop." Report at 132. As already shown, the discriminatory enforcement of fishing regulations against foreign nations is powerful evidence of an assertion of inland status. *See supra* at 28-29. And the fact that Britain "let the matter drop" is clear evidence of both inaction and toleration. Finally, the Master discounted the statements of Britain and Norway in the *Fisheries Case*, Report at 133, but given that mere "inaction or toleration" can establish acquiescence, surely foreign nations' affirmative *reliance* on another nation's claim is even stronger evidence proving the point.

C. Vital Interests Of The United States Support Historic Inland Waters Status.

"[T]he vital interests of the coastal nation, including such elements as geographical configuration, economic interests, and the requirements of self-defense" may be considered in determining historic inland waters. *Alabama & Mississippi Boundary Case*, 470 U.S. at 102. Those factors reinforce a finding that the Archipelago comprises historic waters.

In geographic terms, the waters of the Archipelago plainly are linked more to the coastal mainland than to the open sea. As John Muir observed long ago, mariners see these land-locked straits and sounds as "inland waters that are about as waveless as rivers and lakes." Ex. AK-1 at 13. *Supra* at 2.

In economic terms, the waters are likewise vital to the region. The indigenous inhabitants used the waterways to travel, for land travel was virtually unknown. Ex. AK-5. Even today, the waters are the region's highways. *See supra* at 3. Commercial fishing and the cruise ship industry are the mainstays of the local economy. Thus, Congress long ago recognized the importance of these inland waters to the people of Alaska. *See, e.g., Southeastern Alaska*, H.R. Doc. No. 83-501, at vii (1954) ("[t]he importance of the local waterways to the basic economy of the region cannot be overemphasized") (Ex. AK-133).

In terms of defense, many of the pockets and enclaves of what the United States now claims were high seas in 1959 lie well within the Archipelago. *See* Report, App. C. But allowing potentially hostile vessels to navigate deep into the Archipelago was never contemplated. *Cf. 1972 Hearing* at 14 (under 1971 charts, "a Russian destroyer [could] sail all the way up" the pockets of high seas). Indeed, during and after World War II the military highlighted for Congress the strategic benefits and defensibility of the Archipelago's waters.[22]

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[22] *See, e.g., Skagway Harbor, Alaska*, H.R. Doc. No. 79-746, at 12 (1946) (referring to the "comparatively easily defended Inside

The Master felt that the United States' interest in freedom of navigation outweighed these interests. Report at 135. But when Alaska protested the United States' 1971 disclaimer, the State Department concluded that Alaska's claim would have *no* effect on the United States' interest in freedom of navigation and that a continued refusal to accept Alaska's claim was not justified. *See* Ex. AK-118 at 3-5, 8, and 12.

* * *

This Court has endorsed the view that

> [a] relatively relaxed interpretation of the evidence of historic assertion and of the general acquiescence of other states seems more consonant with the frequently amorphous character of the facts available to support [historic waters] claims than a rigidly imposed requirement of certainty of proof, which must inevitably demand more than the realities of international life could ever yield. [*Alabama & Mississippi Boundary Case*, 470 U.S. at 114 (quotation and citation omitted).]

The Master's crabbed view of the evidence fails this test. He discounted continuous assertions by Russia and the United States of authority over the Archipelago because there were not numerous recorded enforcement actions taken specifically within the disputed pockets and enclaves. But during Russian times, very few vessels plied the remote Alaskan waters. *See, e.g.*, Ex. AK-11 at 245-246 (no more than four American vessels per year). Thus, it is not surprising that the Russians would have enforced their claim simply by "watching their lines" through a "blockade" established at the

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Passage") (Ex. AK-314); *Report of the Alaskan Task Force*, S. Doc. No. 82-10, at 12-13 (1951) (the Archipelago's inland waterway provides "an alternate route [to crossing the Gulf of Alaska] in the event of war"), 49 ("the inland water passage * * * should more easily be protected from interruption by enemy submarines"), 60-61 (this is "the most naturally protected supply line from a military standpoint") (Ex. AK-317).

southern boundary. Ex. US-I-2 at 22. And because the pockets and enclaves comprise a small proportion of the total waters of the Archipelago, it is not surprising that there were not numerous enforcement actions within them. But as the *Marguerite* incident shows, when a foreign vessel was caught in one of those areas, it would be summarily expelled.

Properly viewed, the evidence shows that the United States continually exercised authority over the waters of the Archipelago with the acquiescence of foreign nations. In the *Alabama & Mississippi Boundary Case*, the Court held that Mississippi Sound comprises historic inland waters based on less compelling evidence than exists here. The Court should therefore sustain Alaska's exceptions on Count I and grant summary judgment to the State.[23]

III. THE WATERS OF THE ARCHIPELAGO COMPRISE JURIDICAL BAYS.

Alternatively, the Court should hold that Alaska has title to the pockets and enclaves because, as alleged in Count II of the amended complaint, the waters above those lands qualify as "juridical bays" under the Convention.[24] The waters qual-

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[23] Contrary to the Master's view, Report at 136-137, additional briefing is not needed regarding the Grand Pacific Glacier's alleged retreat into Canada. First, the United States waived the argument by not raising it in opposition to the State's summary judgment motion or even in the United States' own motion. *Cf. id.* Second, as the Master noted, there is persuasive authority that two nations may jointly claim historic inland waters. *Id.* at 137. Third, the United States claimed *all* the waters of the Archipelago until 1971. Thus, even if a very small portion of those waters may have touched Canada at some time due to the vagaries of glacial movement, that unrecognized event does not change the fact that the United States continually claimed the remaining waters as inland with the acquiescence of foreign nations. No more is required to establish historic waters under this Court's precedents.

[24] The claimed bays, denoted "North Bay" and "South Bay," are shown at App. 11a (Ex. AK-129). *See also* Report, App. D.

ify once it is recognized that certain islands must be "assimilated" to the mainland to form a headland of the bays—just as this Court held in *United States* v. *Maine*, 469 U.S. 504 (1985), that Long Island Sound is a juridical bay because Long Island must be treated as part of the mainland.

A. Legal Standards For Juridical Bays.

The Court has adopted the definitions of the Convention to determine the line marking the seaward limit of inland waters. *See United States* v. *California*, 381 U.S. 139, 163-165 (1965); *Louisiana Boundary Case*, 394 U.S. at 35. Article 7 sets forth the requirements for juridical (legal) bays. *See* App. 4a. The standard has two parts. First, the area in question must meet a descriptive test, which requires that there be a "well-marked" and deeply penetrating "indentation" in the coast. Convention art. 7(2). Second, the area must meet the more objective and mathematical "semi-circle" test. *See id.* arts. 7(2), 7(3).[25] For each area meeting that two-part standard, the waters enclosed within 24 nautical mile (nm) closing lines or baselines are automatically inland waters. *See id.* arts. 7(4), 7(5); *see also id.* art. 5(1).

Before applying the tests, however, it is necessary to identify the land that forms the "jaws" of the asserted bay. While bays are generally indentations into the mainland, the Court has recognized that islands may in fact function as extensions of the mainland and thus be treated as forming the headlands of a juridical bay. *Louisiana Boundary Case*, 394 U.S. at 60-67; *Maine*, 469 U.S. at 514-520. *Maine* confirmed not only that a very large island can be assimilated to the mainland coast, but also that such assimilation could result in the recognition of a legal bay where before none was recognized.

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[25] The semi-circle test requires that the area of the bay be at least as large as a semi-circle with a diameter equal to the sum of the lengths of the bay's mouths. App. 4a. That test is not at issue here, because each of the claimed bays passes it easily. *See* Report at 207, 214; Ex. AK-160; App. 15a, 17a (Exs. AK-152, AK-153).

Roughly in the middle of Southeast Alaska, three large interlocking islands—Mitkof, Kupreanof, and Kuiu—effectively form a peninsula that divides the waters of Southeast Alaska into areas that qualify as legal bays to the north and the south. *See* App. 11a (Ex. AK-129). Once this assimilation is recognized, the claimed bays are juridical bays under Article 7 because they are well-marked indentations whose penetration is in such proportion to their mouths as to contain landlocked waters. Moreover, as in *Maine*, legal bay status is buttressed by the fact that the areas are in fact used as bays.

B. Assimilation Is Required Under *Maine*.

In *Maine*, 469 U.S. at 517, the Court reiterated the "consensus that islands may be assimilated to the mainland, and that a common-sense approach [is] to be used to determine which islands may be so treated." The Court saw "no reason to depart from those principles," and concluded, "once again, that an island or group of islands may be considered part of the mainland if they 'are so integrally related to the mainland that they are realistically parts of the "coast" within the meaning of the Convention.' " *Id.* (citation omitted). The Court noted that the factors set forth in the *Louisiana Boundary Case* continued "to be useful in determining when an island or group of islands may be so assimilated." *Id.* These factors include an island's "size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast," as well as the island's "origin * * * and resultant connection with the shore." *Id.* at 516 (quoting *Louisiana Boundary Case*, 394 U.S. at 65 n.84, 66).

Of the more than one thousand islands in the Archipelago, only a handful are so closely related to the mainland or a neighboring island as to be realistically considered a continuation of the mainland or neighboring island. It is those few exceptional islands, separated in their natural state by stretches of unusually shallow waters and fitting together like jigsaw pieces, that give rise to the claimed juridical bays.

Contrary to the Master's view, assimilation of Mitkof, Kupreanof, and Kuiu islands—across the aptly named Wrangell Narrows and Rocky Pass—is required under *Maine*. Each of the blocks of the island peninsula presents a *stronger* case for assimilation than Long Island, which the Court has already held is an effective extension of the mainland.

1. **Wrangell Narrows.** The shores of Mitkof Island and Kupreanof Islands fit tightly together and only a narrow and riverine channel—Wrangell Narrows—passes between them. *See* App. 11a (Ex. AK-129), Ex. AK-131. The average width of the 15 nm channel is 0.4 nm, Ex. AK-135, and its area is a mere 5.52 square nm, Ex. AK-343. As originally constituted, the channel was as shallow as 10 feet. Ex. AK-146 at 5. The Master agreed that these characteristics weigh in favor of recognizing the realistic connection between the islands. Report at 181-182. But he found against assimilation principally because he thought that Wrangell Narrows possesses "significant navigational utility." *Id.* at 183.

This conclusion cannot be reconciled with the Court's treatment of the depth and utility of the East River in *Maine*. The Court relied upon the fact that the East River in its original state was "as shallow as 15-to-18 feet, with a rapid current that made navigation from Long Island Sound extremely hazardous." *Maine*, 469 U.S. at 518. In its improved state, the East River supports substantial traffic across a 34-foot-deep channel. *Id.* at 518 n.11. Significantly, however, such commercial use did not prevent assimilation.[26]

Measured against this standard, the less useful Wrangell Narrows is a stronger candidate for assimilation. Given its original controlling depth of ten feet, the Narrows could not support the vessels in the coastwise service between

[26] The Special Master's report in *Maine* noted that commercial traffic had used the channel, even in its unimproved state, since the 1600s. *See* Report of the Special Master ("*Maine* Report") at 40, *United States* v. *Maine*, No. 35, Orig. (1983) (Ex. AK-130).

Skagway and Puget Sound without delay. A portion of the traffic still used the Narrows, but its tortuous channel and strong currents made it a "menace to life and property." Ex. AK-146 at 5, 9, 13, 15; *see also* Ex. AK-137 at 3. These hazardous conditions led to substantial improvements that more than doubled the controlling depth and significantly widened the channel. The improvements were described as the equivalent of the "construction of an artificial waterway," and the route in its original state as "of negligible value for shipping." Ex. AK-148 at 11. But even as improved, its serpentine course, strong currents, and still-shallow depth prevent use by larger vessels. Ex. AK-139 at 8, 43. More strongly than the East River in *Maine*, the hazards of Wrangell Narrows' shallow, rocky and tortuous channel strongly favor treating Kupreanof Island as an extension of Mitkof Island.

The remaining assimilation factor, the island's origin and resultant connection with the shore, also favors assimilation. In finding otherwise, the Master noted that the islands at issue were not formed of materials brought *from* the mainland by river or glacial action. Report at 171-172. But the materials forming the islands did not come from the adjacent mainland precisely because the islands and the mainland were already of a piece. As in *Maine*, both features "share a common geologic history." 469 U.S. at 519. Tens of millions of years ago, belts of rock or terranes containing the mainland *and* all the islands in Southeast Alaska attached themselves to North America's western margin as a result of tectonic collisions. *See* Ex. AK-466. Importantly, the narrow channels between any of the islands proposed for assimilation mark no change in the character of the rocks. *See, e.g.*, Ex. AK-144 at 454-455. The more recent effects of glaciation also support assimilation. That process—which carved remarkably deep channels elsewhere in Southeast Alaska—left only notably shallow channels between the islands proposed for assimilation. *See* Ex. AK-3 at 3.

Finally, the Master erred in concluding that the lack of social and economic connections comparable to those between Long Island and Manhattan weighed against assimilation in this case. Report at 168-169. To the extent that this factor merits consideration at all, "common sense," *Maine*, 469 U.S. at 517, must play a part. Southeast Alaska is a sparsely populated area, with vast areas of designated wilderness and few communities. In this context, there is as much interchange between the features to be assimilated as is realistic. *See, e.g.*, Ex. US-II-31 at 12 (ferry service between Kake and Petersburg); Ex. US-II-27 at 3-4 (commuter traffic to Petersburg from eastern shore of Kupreanof Island). A contrary holding would render virtually any unpopulated or remote area ineligible for assimilation as a matter of law, regardless of its physical connection to the mainland.

2. Rocky Pass. Under *Maine*, a realistic connection also exists between Kupreanof and Kuiu Islands. The large islands' shape and their position in relation to one another favor assimilation of the features. *See* App. 11a (Ex. AK-129). Kupreanof Island has a vaguely rectangular shape. Along approximately one third of its western coast, the irregularly shaped Kuiu Island is nestled close off shore, separated only by a notably narrow and intricate channel called, appropriately, Rocky Pass. *Id.*

The width of Rocky Pass at mean lower low water presents a stronger case for assimilation than the East River. Long Island at its closest is 0.5 nm from the mainland, *Maine*, 460 U.S. at 518, while Kupreanof and Kuiu Islands are separated at places by less than 0.1 nm. *See* Ex. AK-135 at HW14382 (at the Summit). While for the approximately 12 nm course of the East River, the average channel width approaches 1 nm, for 14 nm in Rocky Pass, it is 0.57 nm. *See* Ex. US-II-22; Ex. AK-135 (1 km = 0.54 nm); Report at 153. And the channel's area is just 11.23 square nm. *See* Ex. AK-343.

The shallowness and inutility of Rocky Pass reinforce the case for assimilation. In its natural state, Rocky Pass—the

central part of Keku Strait—had a controlling depth of only *one foot*. Because of numerous rocks and strong currents, small vessels could make a hazardous passage only during high-water slack. *See* Ex. AK-133 at 9. Dredging improved the channel to a controlling depth of just five feet. But even with the improvements, traverse of the "narrow intricate passage" is still recommended only at high-water slack and with local knowledge. *See* Ex. AK-132 at 164, 174-175.

The characteristics of Rocky Pass evidence a stronger connection between the two islands than was recognized across the East River in *Maine*. Although the islands' coasts diverge at either end of Rocky Pass, the fact that the coasts may not be connected elsewhere does not diminish their realistic connection at Rocky Pass. That connection—like the one that exists across the East River but not the entire facing coast of Long Island—justifies assimilation.

The Master, however, concluded that "the entire area across which the two land-forms of interest face one another," as identified by what he termed the "45-degree-test," must be considered the intervening waters. Report at 154-160 (citation omitted). He therefore included the broad bay-like areas at either end of Rocky Pass as part of the water area that must be ignored to recognize an effective connection between Kuiu and Kupreanof Islands. *Id.* at 177-181.

That was error. The East River also has broad bay-like openings at both ends (Long Island Sound and New York Harbor), *see* Ex. AK-464, yet the Court determined assimilation in *Maine* by looking only at the River. So too here. The 45-degree-test was developed for determining the mouths of bays. *See* Report at 156. For this case and for Long Island Sound, it is not effective at identifying intervening waters for an assimilation inquiry. Had the test been used in *Maine*, the relevant intervening waters would have been much broader and Long Island would likely not have met the

standards for assimilation. *See* Ex. AK-464; Reply in Supp. of AK Mot. for Summ. Judg. on Count II at 6.[27]

Even if the test were appropriate to identify intervening waters, it works best only where the features' axes are aligned and their shapes are relatively uniform. *See, e.g.*, Hodgson & Alexander, *supra*, at 21 fig. 11 (Ex. AK-151). That configuration is not present here, nor was it in *Maine*. The irregular shape of Kuiu Island forms not one but three distinct areas of water between its shores and Kupreanof Island: Rocky Pass and two broader bay-like areas to the north and south. The assimilation inquiry, however, should focus on the place, if any, where a realistic connection may be found under the Court's factors. Just as two land areas joined by a narrow isthmus would be connected even if the isthmus separated two bays, so Kupreanof and Kuiu islands are effectively joined at Rocky Pass.

Rocky Pass, like the East River, is properly considered the intervening waters across which an effective connection between the coastal formations is forged. In that significant stretch of channel-like water, there is an unmistakably close relation between the shores that justifies assimilation under the Court's factors. The Master's inflexible approach prevents that realistic assessment by incorrectly exaggerating the area of water to be ignored.

3. Dry Island. The Master failed to acknowledge that Dry Island, to which the major blocks of the island peninsula connect, is also readily assimilated to the mainland. *See* Report at 192-193. It is visually apparent from a map that the island's shape, size and relationship to the mainland all

[27] Indeed, the main proponents of the test recognized that it is not always warranted even for its original purpose. As they have noted, for some coastal configurations, its validity is reduced and "the rule does not prevail." Robert D. Hodgson & Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances* 10 (1972) (Ex. AK-151).

favor assimilation. *See id.*, App. H (Ex. AK-334). The shallowness and inutility of the narrow and quintessentially riverine channel between the island and mainland—the north arm of the Stikine River—also call for assimilation given that the north arm is navigable only by small craft at high water. *See* Ex. AK-132 at 168. Thus, just as the Court had no difficulty treating Manhattan Island as part of the New York mainland even though it is separated from it by the Harlem River, so too is Dry Island part of the mainland of Alaska.

* * *

In sum, the characteristics that justified treating Long Island as part of the mainland are present for each component of the island peninsula in this case. To paraphrase *Maine*:

> Both the proximity of [the island peninsula] to the mainland, the shallowness and inutility of the intervening waters as they were constituted originally, and the fact that [they are] not * * * opening[s] to the sea, suggest that [the island peninsula] be treated as an extension of the mainland. [469 U.S. at 519 (alterations shown).]

Moreover, both cases involve large islands that relate to the coast such that they "result [in] * * * large pocket[s] of water * * * [that] [are] almost completely enclosed by surrounding land." *Id.* at 518. *See* App. 11a (Ex. AK-129). As in *Maine*, those waters qualify as juridical bays.

C. North And South Bays Satisfy Article 7.

Under the Convention, a juridical bay is "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." Convention art. 7(2). The bay must also pass the semi-circle areal test. *Id.* arts. 7(2), 7(3). Both North and South Bays meet these standards, with the result that most of the waters of the Archipelago are enclosed behind baselines totaling 24 nm for each bay. App. 12a, 13a (Exs. AK-164, AK-165), *see also* Convention art. 7(5). The Master erred in concluding otherwise.

1. **North Bay.** The Master opined that North Bay is not a "well-marked indentation" as required by Article 7(2). *See* Report at 222.[28] Though he readily acknowledged the clear bay-shape of the coast of North Bay, he did not consider those contours to be obvious from looking at a map *with all islands depicted.* In addition, he considered that past delimitations of the area—which have not acknowledged the existence of a juridical bay—weighed against finding the bay a well-marked indentation. *Id.* at 217-218.

The Master's approach fails to give proper significance to the consequences of assimilation. Once the island peninsula is viewed as extending the mainland, the contours of the bay are apparent. *See* App. 14a (graphic with islands removed) (Ex. AK-149).[29] The existence of a well-marked indentation is not negated because that indentation is filled with islands. *See* App. 15a (islands restored) (Ex. AK-152). In fact, in the eyes of any mariner the maze of sheltering islands that comprise the Archipelago necessarily *increases* the waters' connection with Alaska. *See supra* at 2. It defies logic to hold that their presence actually detracts from bay status.

The fact that the claimed juridical bays have not previously been recognized as such cannot disqualify them. Under the Convention, it is the fact of an obvious indentation that matters, not past delimitation. North Bay is at least as well-marked an indentation as Long Island Sound, which prior to *Maine* was considered a geographic strait. Indeed, if prior delimitation controlled, then Article 7 would be largely useless, since there could be no new applications of it.

That North Bay is a "well-marked indentation" is reinforced by the fact that the area "constitute[s] more than a

[28] The Special Master agreed that the other requirements of Article 7(2) were satisfied. Report at 214-215, 220-222.

[29] Reliance on such an exhibit is consistent with the United States' usual practice. *Maine* Report at 24 n.17 (Ex. AK-467).

mere curvature of the coast." Convention art. 7(2). This Court has paired these complementary requirements, *Maine*, 469 U.S. at 514, and North Bay satisfies both. It is far too pronounced an indentation to be a "mere curvature in the coast." North Bay thus meets the requirements of a bay.[30]

2. **South Bay.** The Master opined that South Bay is not a well-marked indentation and lacks sufficient penetration in proportion to the width of its mouth. *See* Report at 222-224. For the same reasons that North Bay is a well-marked indentation, so too is South Bay. It is a pronounced and well-marked indentation, constituting far more than a mere curvature of the coast, *see* App. 16a, 17a (Exs. AK-150, AK-153), and the presence of islands supports a juridical bay finding.

South Bay also has sufficient proportion of penetration to width. For this assessment, the penetration should be compared to the width of the *actual* openings or entrances to the bay, not a fictitious mouth that ignores islands. That is the width used under Article 7(3)'s semi-circle test.[31] And this Court has identified the lines across the natural entrances described in Article 7(3) as the baselines "*for all purposes*," explicitly rejecting the notion that islands forming multiple mouths are relevant only to the semi-circle test. *See Louisiana Boundary Case*, 394 U.S. at 55. Instead, as the drafters of the Convention stated in their Commentary, "the total

[30] As with Count I, *see supra* n.23, there is no need for more briefing regarding the alleged retreat of the Grand Pacific Glacier, *cf.* Report at 219-220, because the United States never presented the issue in its motion for summary judgment or opposition. In any event, North Bay is *presently* a juridical bay regardless of any earlier status. Under the SLA, the coast line is "ambulatory and [will] vary with the frequent changes in the shoreline." *Louisiana Boundary Case*, 394 U.S. at 32-35. *See Alaska*, 521 U.S. at 31.

[31] *See* Convention art. 7(3) ("Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.").

length of the lines drawn across all the different mouths will be regarded as the width of the bay." (1956) 2 Y.B. Int'l L. Comm'n 269 (quoted in *Louisiana Boundary Case*, 394 U.S. at 55 n.74). *Accord*, 1955 Commentary (Ex. AK-156).[32] The natural entrances to South Bay, *see* App. 17a (Ex. AK-153), have a total width of 47.49 nm. The bay's penetration far exceeds this amount, *see* Ex. AK-159 (partially reproduced at Report, App. J), resulting in a proportion of penetration to width that easily passes any conceivable test.

But even using the Master's fictitious mouth, *see* Report at 202-205, the proportion is sufficient. To determine penetration, the Master used the "longest straight line" method, which measures the longest line from any point on the bay closing line to the point of deepest penetration within the bay. *See id.* at 205-206. Under this method, the bay's penetration is 95.5 nm. *Id.* at 225 n.16.[33] When compared to the 120 nm width of a line drawn between the mainland headlands, the proportion of penetration to width is 0.8:1. *Id.*

That is sufficient. Article 7 sets no minimum numeric proportion, and as the Master correctly noted there is no authority requiring a 1:1 ratio. Report at 210-211. South Bay's penetration, which is almost 1:1, easily passes muster. For even if one must ignore islands in a bay's mouth in calculating its width, as noted in the drafters' Commentary relied on in the *Louisiana Boundary Case* "the presence of islands at the mouth of an indentation tends to link it more closely to the mainland, and this consideration may justify

[32] For additional support for Alaska's position on the proper measure of the width of the mouth, *see* Mem. in Supp. of AK Mot. for Summ. Judg. on Count II at 31-39, Reply in Supp. of AK Mot. for Summ. Judg. on Count II at 20-22.

[33] The United States' proposed 75 nm line, Report at 224, is not the "longest straight line" and thus does not capture the full penetration inland from the fictitious mouth. For this reason, we use the Master's 95.5 nm estimate based on Alaska's exhibit. *Id.*

some alteration of the ratio between the width and the penetration of the indentation." 394 U.S. at 56 (*quoting* (1956) Y.B. Int'l L. Comm'n 269). Thus, even if South Bay's penetration were otherwise deemed sub-optimal compared to its fictitious mouth, the presence of large islands blocking much of the opening "tends to link [the bay] more closely to the mainland," and renders its proportion sufficient. *Id.*

The sufficiency of South Bay's penetration is reinforced by the results of the alternative "perpendicular" method, which uses a perpendicular line from the closing line to a point of deepest penetration. *See* Hodgson & Alexander, *supra*, at 8-9 (Ex. AK-151). This method appears to have been used in *United States* v. *California*, when the Court approved Monterey Bay as a legal bay. *See* 381 U.S. at 169-170, App. B. Using this method, Monterey Bay's proportion of penetration to width is 0.48:1. Report at 211. South Bay's penetration under this method is about 68 nm, *see* Report, App. J, yielding a proportion of 0.57:1 when compared to the 120 nm fictitious mouth. A perfect semicircular bay has a proportion of 0.5:1 under the perpendicular method (its radius divided by its diameter). South Bay's proportion thus exceeds both this benchmark as well as the result this Court accepted as adequate for Monterey Bay.

D. The Rationale For Bay Recognition And The Nature Of The Areas Favor Juridical Bay Status.

The waters comprising North and South Bays are the kind Article 7 was designed to protect. As the Court has stated:

> The ultimate justification for treating a bay as internal waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast. [*Maine*, 469 U.S. at 519.]

The use of these waters bears this out. The waters are of little interest to the community of nations, but of great importance to local residents. As in *Maine*, there is no route of

international passage *through* the waters claimed as juridical bays. *Id.* The major ocean routes bypass Southeast Alaska. *See* Ex. AK-166. Even traffic to other Alaska ports avoids the Archipelago's intricate passages. *See* Exs. AK-166, AK-167. The waters' lack of value to non-local shipping reflects the fact that the maze of straits and sounds surrounding the Alexander Archipelago—unlike straits off open coasts—penetrate deeply inland. As a consequence, the waters' principal value is naturally felt by the coastal residents. For the vessels entering its waters, Southeast Alaska is the destination.[34] And for Southeast's communities and residents, the waters are their lifeblood. *See supra* at 2-3.

CONCLUSION

For the foregoing reasons, the Court should sustain Alaska's exceptions, grant Alaska summary judgment on Counts I, II, and IV of the Amended Complaint, and confirm the United States' disclaimer of title on Count III.

Respectfully submitted,

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[34] Even if some vessels pass through South Bay on the way to North Bay, that is consistent with bay status for both. Just as a captain in Connecticut need not sail around Long Island to reach New York Harbor, vessels bound for points only in North Bay may take the shortest route and traverse South Bay. *See Maine*, 469 U.S. at 519. The Master erred in finding otherwise. Report at 184.

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North Bay Closing Lines (Ex. AK-164) 12a

South Bay Closing Lines (Ex. AK-165) 13a

North Bay With Islands Removed (Ex. AK-149) 14a

North Bay With Islands Restored (Ex. AK-152) 15a

South Bay With Islands Removed (Ex. AK-150) 16a

South Bay With Islands Restored (Ex. AK-153) 17a

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (codified at 48 U.S.C. note prec. § 21):

* * *

Section 4—Compact With United States.

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property, (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation * * *.

Section 5—Title to Property.

The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Section 6—Selection of public lands, fish and wildlife, public schools, mineral permits, mineral grants, confirmation of grants, internal improvements, submerged lands.

* * *

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., sections 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., sections 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., sections 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. Sums of money that are available for apportionment or which the Secretary of the Interior shall have apportioned, as of the date the State of Alaska shall be deemed to be admitted into the Union, for wildlife restoration in the Territory of Alaska, pursuant to section 8 (a) of the Act of September 2, 1937,

as amended (16 U.S.C., section 669g-1), and for fish restoration and management in the Territory of Alaska, pursuant to section 12 of the Act of August 9, 1950 (16 U.S.C., section 777k), shall continue to be available for the period, and under the terms and conditions in effect at the time, the apportionments are made. Commencing with the year during which Alaska is admitted into the Union, the Secretary of the Treasury, at the close of each fiscal year, shall pay to the State of Alaska 70 per centum of the net proceeds, as determined by the Secretary of the Interior, derived during such fiscal year from all sales of sealskins or sea otter skins made in accordance with the provisions of the Act of February 26, 1944 (58 Stat. 100; 16 U.S.C., sections 631a-631q), as supplemented and amended. In arriving at the net proceeds, there shall be deducted from the receipts from all sales all costs to the United States in carrying out the provisions of the Act of February 26, 1944, as supplemented and amended, including, but not limited to, the costs of handling and dressing the skins, the costs of making the sales, and all expenses incurred in the administration of the Pribilof Islands. Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, and the Act of June 28, 1937 (50 Stat. 325), as amended (16 U.S.C., section 772 et seq.).

* * *

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Article 7 of the Convention on the Territorial Sea and Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, 516 U.N.T.S. 205, T.I.A.S. No. 5639:

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (codified as amended at 43 U.S.C. § 1301 et seq.):

43 U.S.C. § 1301—Definitions

When used in this subchapter and subchapter II of this chapter—

* * *

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * *

43 U.S.C. § 1312—Seaward Boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

* * *

43 U.S.C. § 1313—Exceptions From Operation of Section 1311 of This Title

There is excepted from the operation of section 1311 of this title—

(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea);

28 U.S.C. § 2409a—Real Property Quiet Title Actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

* * *

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

Nov. 7, 1925 Letter from Assistant Treasury Secretary to Secretary of State (without enclosure) (Ex. AK-461)

Nov. 7, 1925

The Honorable

The Secretary of State.

Sir:

With reference to previous correspondence and especially to a letter, So 711.428/930, which Mr. Wright was so good as to address to this Department on September 22, 1925 concerning the seizure of the Canadian schooner MARGUERITE and the boarding of the gas screw MABEL C during July 1924, I have the honor to state that the commanding officer of the Coast Guard Cutter SMITH, who boarded the MABEL C, reports that this vessel is not of Canadian registry, but is an American owned vessel. A search of the various British maritime registers fails to show the name of any vessel called the MABEL C which corresponds with the vessel now under discussion. The list of merchant vessels of the United States however shows a MABEL C, official number 218218, hailing from Ketchikan, Alaska. It therefore appears that the British Government cannot be interested in the operations of this vessel. Under separate cover I am forwarding you the United States Coast and Geodetic Survey Chart No. 8102 on which is marked the position where the MARGUERITE was first sighted fishing in American waters and where the chase was started by the United States Coast Guard Cutter SMITH and also the position where the vessel was seized. As of passing interest the position where the MABEL C was boarded is also marked on the chart.

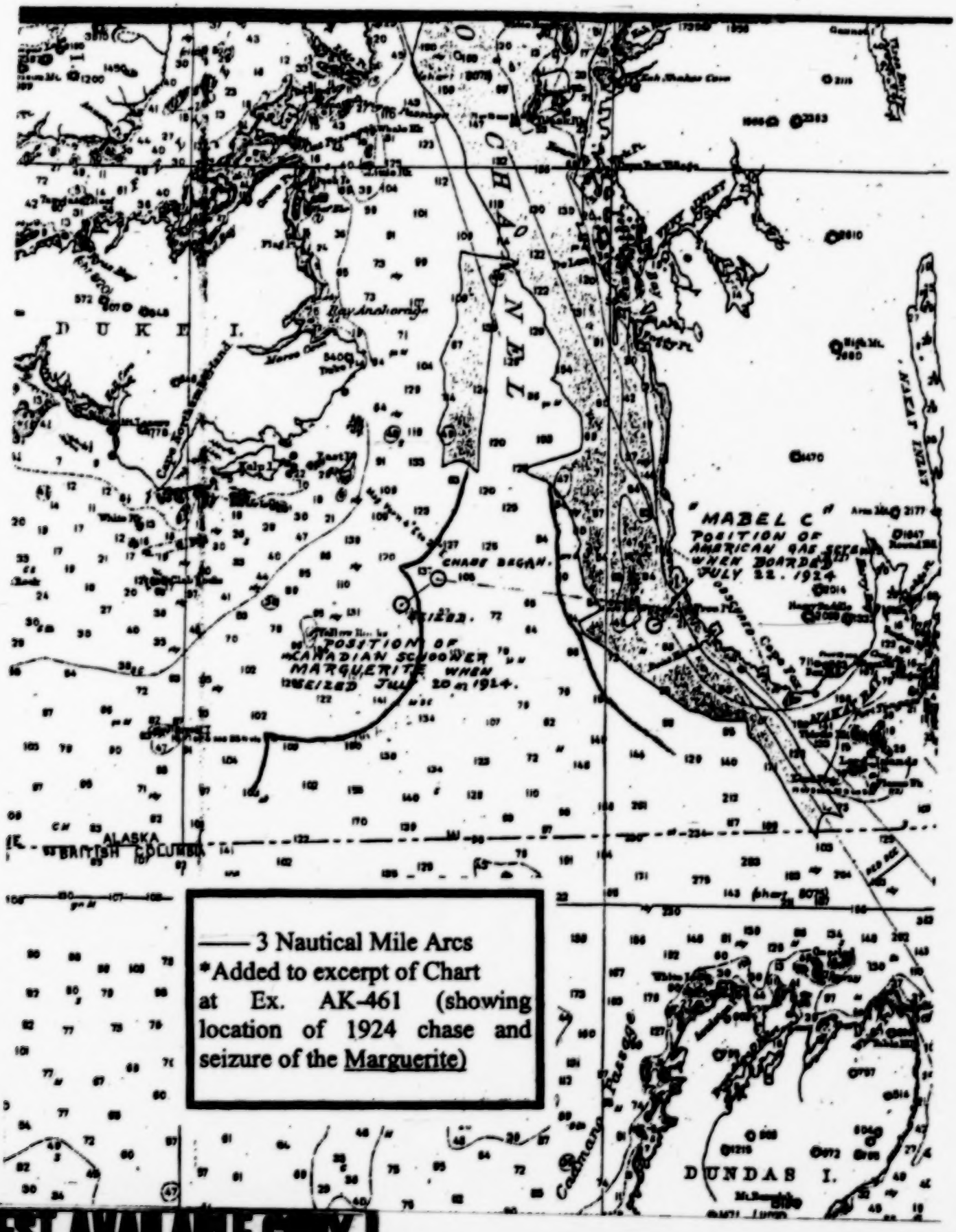
Respectfully,

/s/

L. C. Andrews,

Assistant Secretary

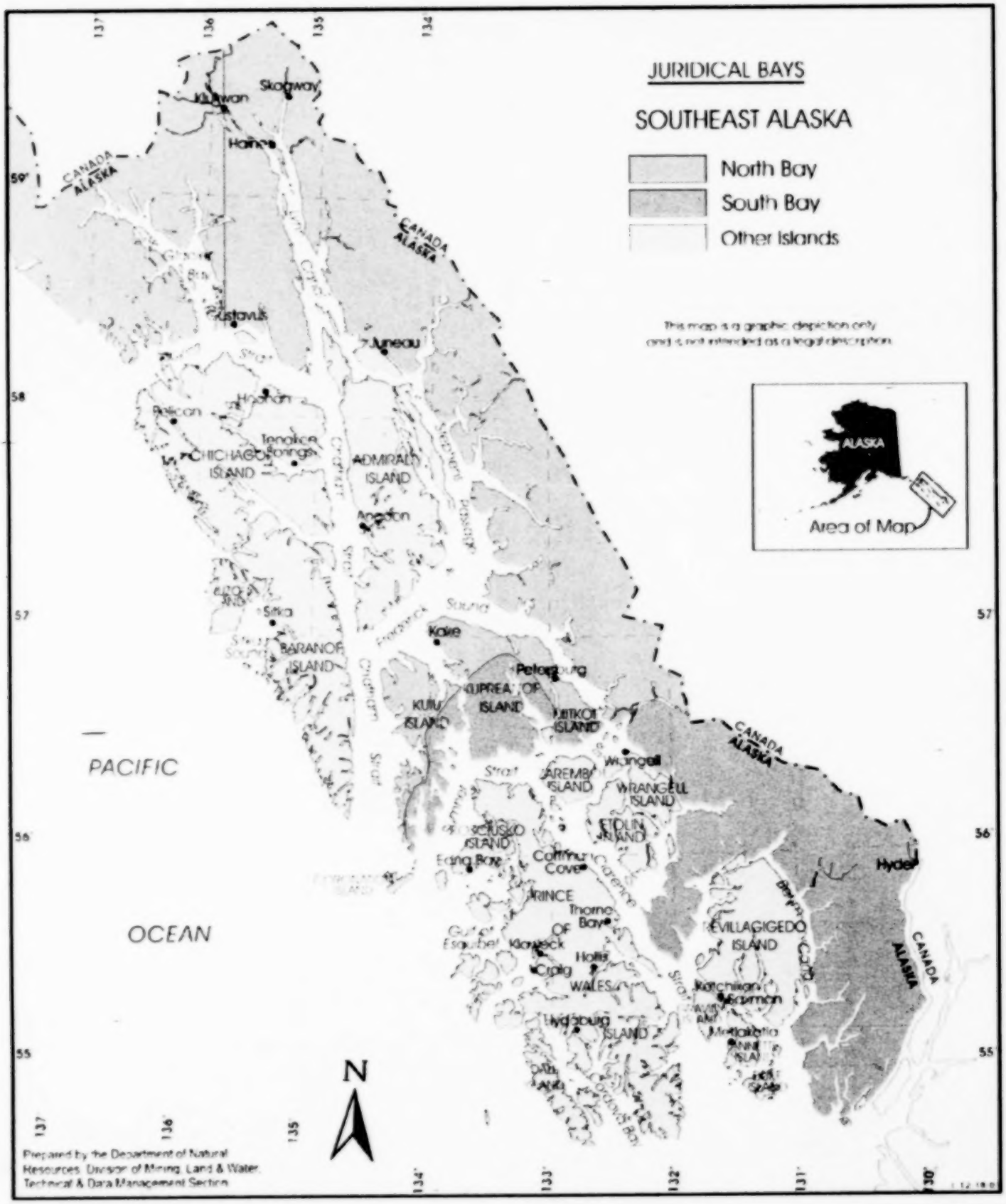
Oct. 27, 1925 Chart Showing Location of Interception of *Marguerite* (with three mile arcs drawn) (Ex. AK-462)



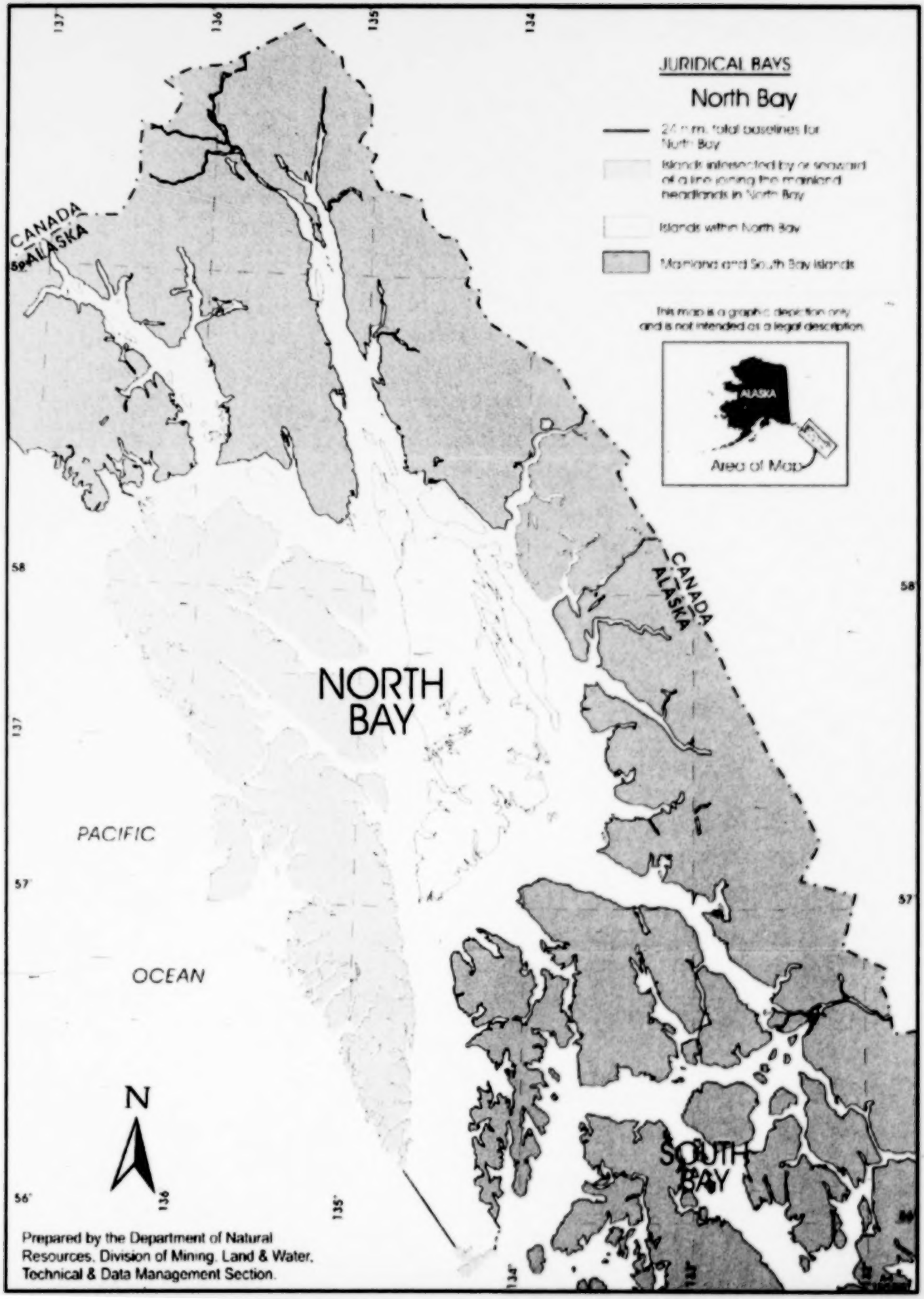
—— 3 Nautical Mile Arcs
*Added to excerpt of Chart at Ex. AK-461 (showing location of 1924 chase and seizure of the Marguerite)

BEST AVAILABLE COPY

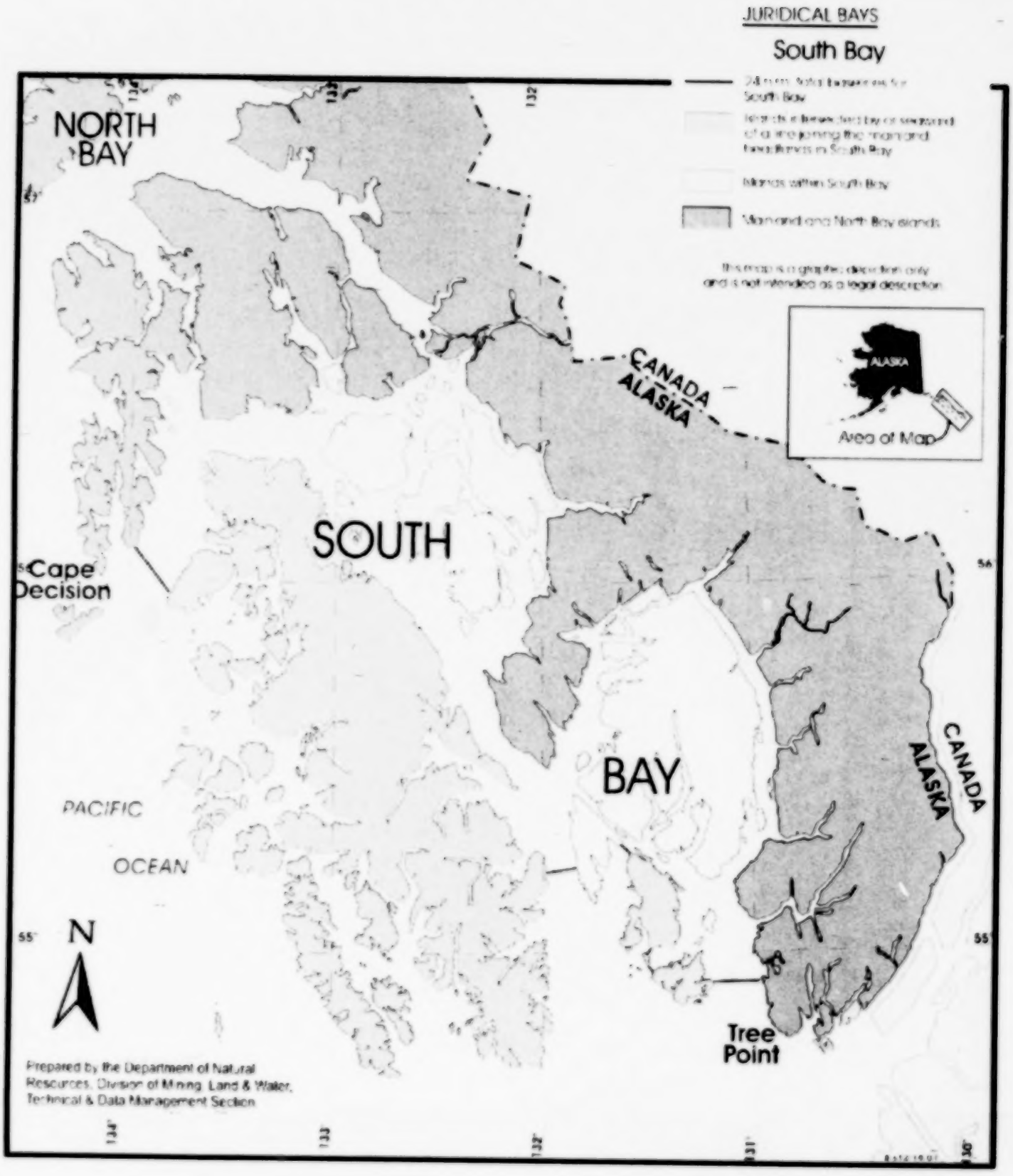
Juridical Bays—Southeast Alaska (Ex. AK-129)


JURIDICAL BAYS
SOUTHEAST ALASKA
North Bay
South Bay
Other Islands
This map is a graphic depiction only and is not intended as a legal description.
ALASKA
Area of Map
PACIFIC
OCEAN
CANADA
ALASKA
Skagway
Haines
Juneau
Petersburg
Wrangell
Hyder
Craig
Klawock
Thorne Bay
Coffman Cove
Kake
Sitka
Ketchikan
Prepared by the Department of Natural Resources, Division of Mining, Land & Water, Technical & Data Management Section

North Bay Closing Lines (Ex. AK-164)

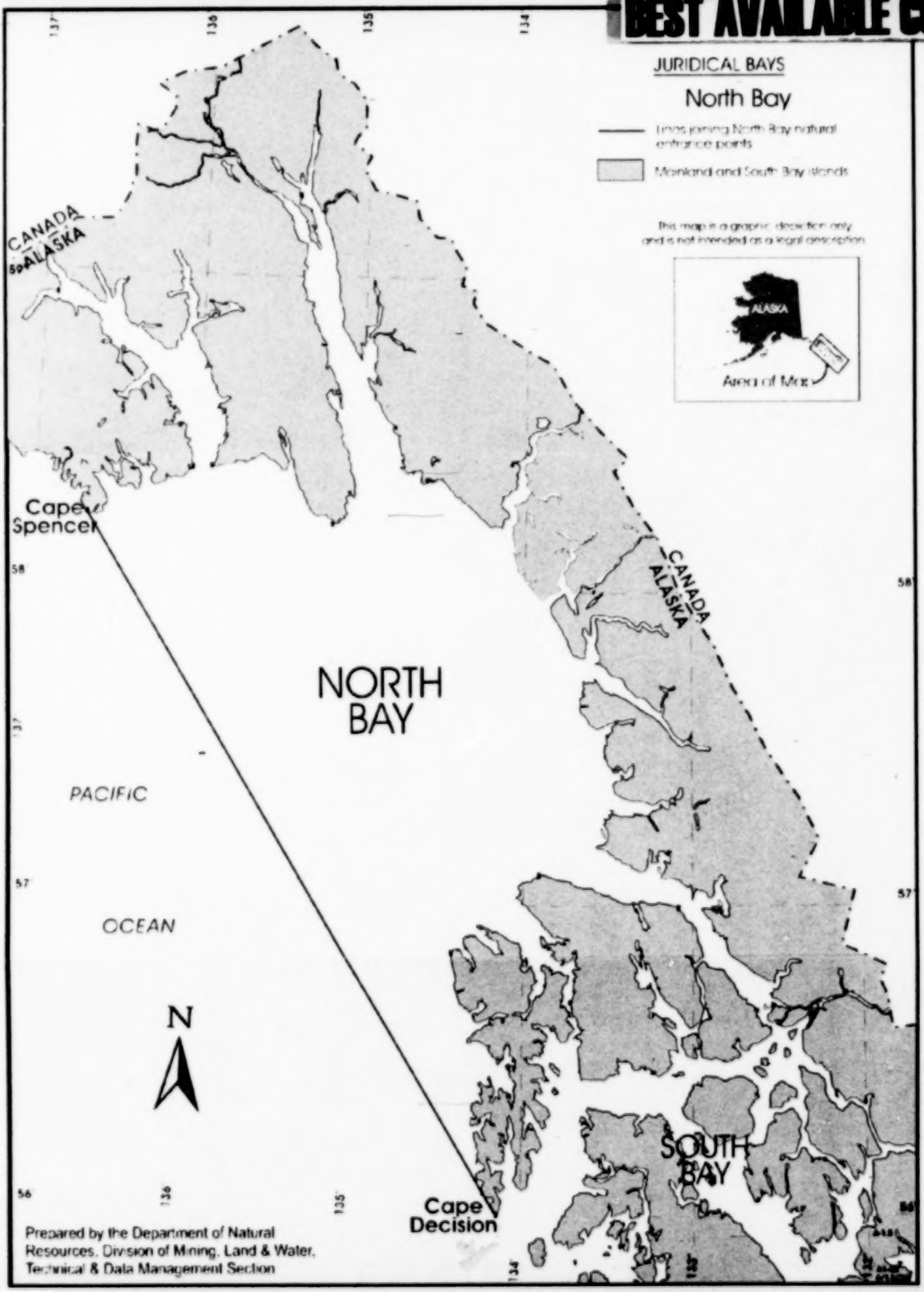

JURIDICAL BAYS
North Bay
24 n.m. "total" baselines for North Bay
Islands intersected by or seaward of a line joining the mainland headlands in North Bay
Islands within North Bay
Mainland and South Bay Islands
This map is a graphic depiction only and is not intended as a legal description.
ALASKA
Area of Map
CANADA
ALASKA
CANADA
ALASKA
NORTH BAY
PACIFIC
OCEAN
SOUTH BAY
N
137°
136°
135°
134°
58°
57°
56°
Prepared by the Department of Natural Resources, Division of Mining, Land & Water, Technical & Data Management Section.

South Bay Closing Lines (Ex. AK-165)

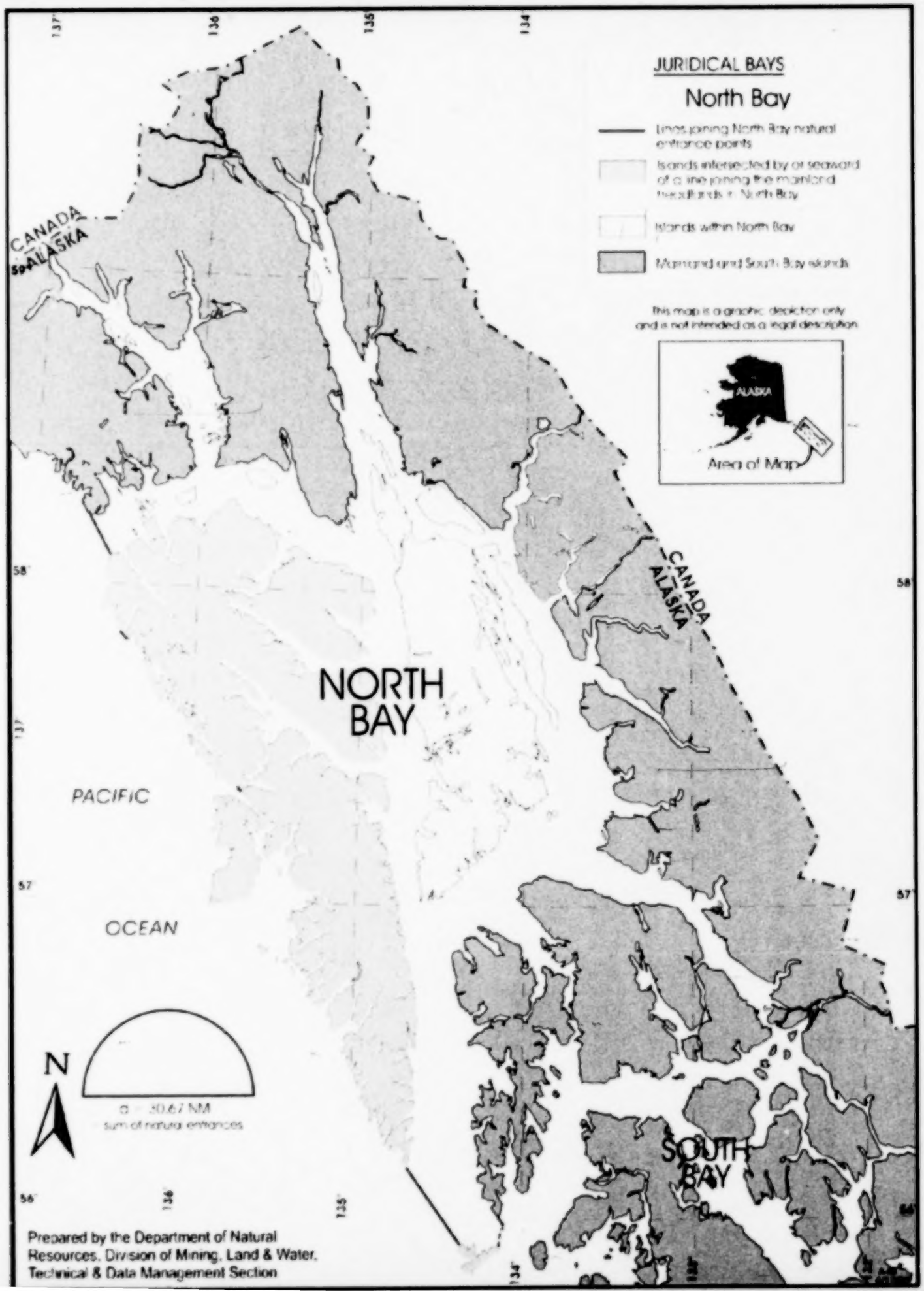

JURIDICAL BAYS
South Bay
NORTH BAY
SOUTH BAY
CANADA
ALASKA
ALASKA
Area of Map
Cape Decision
PACIFIC OCEAN
N
Tree Point
CANADA
ALASKA
Prepared by the Department of Natural Resources, Division of Mining, Land & Water, Technical & Data Management Section

North Bay With Islands Removed (Ex. AK-149)

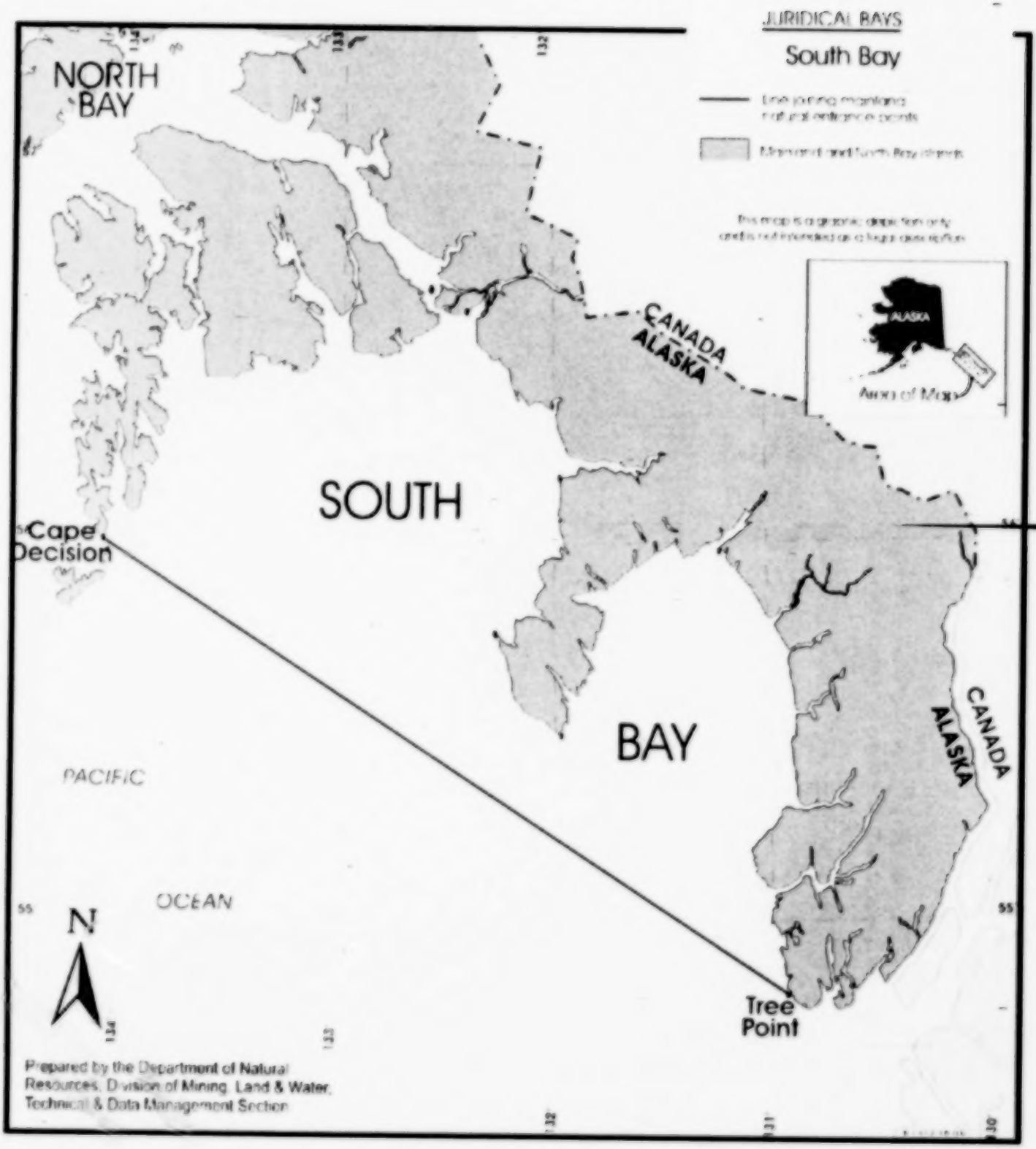
BEST AVAILABLE COPY



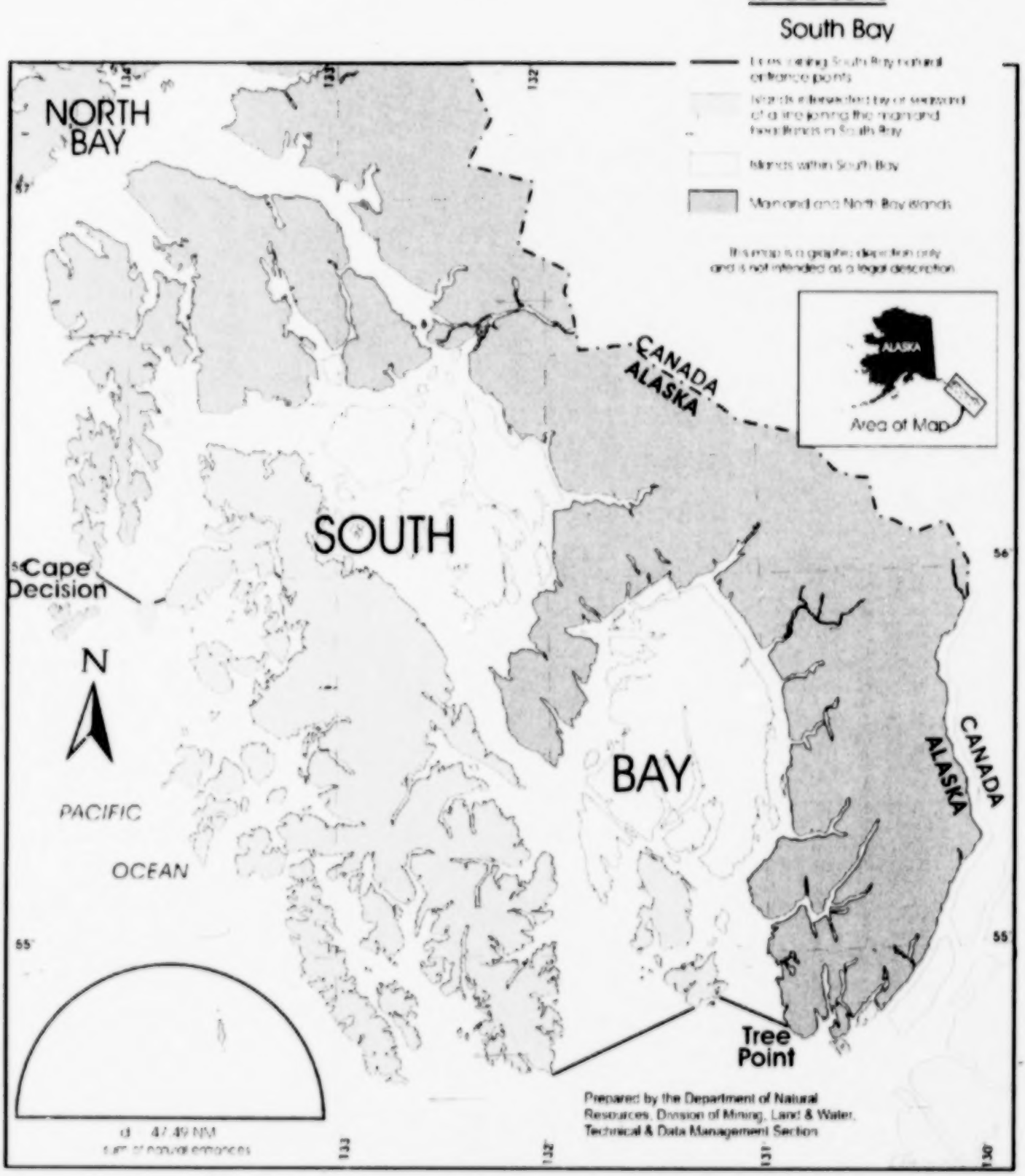
North Bay With Islands Restored (Ex. AK-152)


JURIDICAL BAYS
North Bay
Lines joining North Bay natural entrance points
Islands intersected by or seaward of a line joining the mainland headlands of North Bay
Islands within North Bay
Mainland and South Bay islands
This map is a graphic depiction only and is not intended as a legal description
ALASKA
Area of Map
CANADA
ALASKA
CANADA
ALASKA
NORTH BAY
PACIFIC
OCEAN
SOUTH BAY
N
d = 20.67 NM
sum of natural entrances
137
136
135
134
58
57
56
Prepared by the Department of Natural Resources, Division of Mining, Land & Water, Technical & Data Management Section

South Bay With Islands Removed (Ex. AK-150)


JURIDICAL BAYS
South Bay
NORTH BAY
CANADA
ALASKA
SOUTH
BAY
Cape Decision
Tree Point
PACIFIC
OCEAN
N
CANADA
ALASKA
Prepared by the Department of Natural Resources, Division of Mining, Land & Water, Technical & Data Management Section

South Bay With Islands Restored (Ex. AK-153)


JURIDICAL BAYS
South Bay
Lines crossing South Bay mouth at entrance points
Islands in bay or seaward of a line joining the mainland headlands in South Bay
Islands within South Bay
Mainland and North Bay islands
This map is a graphic depiction only and is not intended as a legal description
NORTH BAY
CANADA
ALASKA
ALASKA
Area of Map
SOUTH
BAY
Cape Decision
N
PACIFIC
OCEAN
CANADA
ALASKA
Tree Point
55°
56°
55
Prepared by the Department of Natural Resources, Division of Mining, Land & Water, Technical & Data Management Section

(19)

No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF OF THE UNITED STATES IN RESPONSE TO EXCEPTIONS OF THE STATE OF ALASKA

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QUESTIONS PRESENTED

The State of Alaska invoked this Court's original jurisdiction to quiet title to marine submerged lands in the vicinity of the Alexander Archipelago in southeastern Alaska. The Court granted Alaska leave to file a four-count amended complaint setting out its claims. The Special Master has recommended, in response to the parties' motions, that the Court grant summary judgment to the United States on Counts I, II, and IV of Alaska's amended complaint, deny summary judgment to Alaska on Counts I and II, and confirm the United States' proposed disclaimer of title to the submerged lands at issue in Count III. Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title (Mar. 2004).

The United States supports the Special Master's recommendations. The State of Alaska has filed three exceptions, which (listed in the order that the issues are addressed in the Special Master's Report) present the following questions:

1. Whether the Special Master correctly determined, in recommending that the Court grant the United States summary judgment on Count I of Alaska's amended complaint, that the straits and channels separating the islands of the Alexander Archipelago from each other and the mainland are not "historic inland waters." Alaska Exception 2.

2. Whether the Special Master correctly determined, in recommending the Court grant the United States summary judgment on Count II of the amended complaint, that the straits and channels separating the islands of the Alexander Archipelago from each other and the mainland do not constitute one or more juridical bays. Alaska Exception 3.

3. Whether the Special Master correctly determined, in recommending that the Court grant the United States sum-

mary judgment on Count IV of Alaska' amended complaint, that the United States reserved, and retained in federal ownership at the time of Alaska's statehood, the marine submerged lands within Glacier Bay National Monument (now Glacier Bay National Park and Preserve) to allow scientific study of tidewater glaciers, to preserve remnants of ancient inter-glacial forests, and to protect wildlife, including the brown bear. Alaska Exception 1.

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REPLY BRIEF OF THE UNITED STATES IN RESPONSE TO EXCEPTIONS OF THE STATE OF ALASKA

INTRODUCTION

On June 12, 2000, this Court granted the State of Alaska leave to file a bill of complaint against the United States seeking to quiet title to marine submerged lands in Southeast Alaska. See *Alaska* v. *United States*, 530 U.S. 1228 (2000). The Court appointed a Special Master, Professor Gregory E. Maggs, to conduct proceedings in this case. 531 U.S. 941 (2000). The Court granted Alaska leave to amend its complaint, 531 U.S. 1066 (2000), and, in accordance with the Master's first report, denied certain individuals leave to intervene, 534 U.S. 1103 (2002). See Report of the Special Master on the Motion to Intervene (Nov. 2001). This case is now before the Court on the Master's 2004 Report, which addresses the parties' respective motions for summary judgment and the United States' unopposed motion for confirmation of a disclaimer of title. 124 S. Ct. 2093 (2004). See Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title (Mar. 2004) (Rep.).[1]

The Master's comprehensive 327-page report recommends that the Court: "(1) grant summary judgment to the United States on counts I, II, and IV; (2) deny summary judgment to Alaska on counts I and II; (3) confirm the United States' proposed disclaimer; (4) dismiss count III for lack of juris-

[1] The Special Master's report and the parties' briefs on motions for summary judgment are posted on the Master's Website: http://www.law.gwu.edu/facweb/gmaggs/128orig/docket.htm. In this brief, the United States abbreviates its memoranda in support of its motions for summary judgment as US-[Count No.] Memo.; its briefs in opposition to Alaska's motions for summary judgment as US-[Count No.] Opp.; its reply briefs in support of its motions for summary judgment as US-[Count No.] Reply, and its exhibits as Exh. US-[Count No.]-[Exhibit No.].

diction; (5) dismiss Alaska's motion for summary judgment on count III as moot; and (6) order that Alaska take nothing on counts I, II, and IV of its amended complaint." Rep. 1; see Rep. 294. Specifically, the Master recommends that the Court:

- reject Alaska's contention, in Count I of its amended complaint, that the State possesses title to pockets and enclaves of marine submerged lands within the Alexander Archipelago on the theory that the waters above those lands constitute "historic inland waters." Rep. 9-138.

- reject Alaska's contention, in Count II of its amended complaint, that the State possesses title to pockets and enclaves of marine submerged lands within the Alexander Archipelago on the theory that the waters above those lands constitute heretofore-unnoticed juridical bays. Rep. 138-226.

- reject Alaska's contention, in Count IV of its amended complaint, that Alaska possesses title to marine submerged lands within Glacier Bay National Park and Preserve (formerly Glacier Bay National Monument) on the theory that, when Congress set apart that area for federal use, it retained only the uplands and not the submerged lands therein. Rep. 227-276.

- enter the United States' unopposed disclaimer of title, which makes clear, in response to Count III of Alaska's amended complaint, that the United States makes no claim that the creation of the Tongass National Forest, by itself, has resulted in federal retention of marine submerged lands within the Alexander Archipelago. Rep. 276-294.

The Master's recommendations, if adopted, will resolve all contested issues and end the litigation in this case. See Rep. 1, 294.

STATEMENT

Alaska seeks to quiet title, under the Quiet Title Act of 1972, 28 U.S.C. 2409a(a), to marine submerged lands in a region known as the Alexander Archipelago. That region encompasses an area of southeastern Alaska that extends approximately 500 miles from north to south and 100 miles from east to west and includes more than 1000 islands. See Rep. 2, 302 (map). Alaska claims entitlement under the equal footing doctrine, see *United States* v. *Alaska*, 521 U.S. 1, 5 (1997) (*Alaska*), and the Submerged Lands Act of 1953 (SLA), 43 U.S.C. 1301 *et seq.*

Taken together, the equal footing doctrine and the SLA recognize that a State generally has title to submerged lands beneath inland navigable waters and beneath marine waters within its boundaries, which generally extend 3 geographic (nautical) miles from the State's coastline, but that the United States may prevent title from passing to the State by retaining title at the time of statehood. Rep. 3. See *Alaska*, 521 U.S. at 35; 43 U.S.C. 1301(b), 1311(a), 1313(a). The location of the State's coast line, which generally follows the low-water line and crosses the mouths of rivers and bays, is determined in accordance with principles set out in the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639 (Convention). See Rep. 5-9 (terminology and basic principles).

Alaska claims title to marine submerged lands within the Alexander Archipelago on four distinct theories that are set out, respectively, in the four counts of its amended complaint. Count I alleges that the waters of the Alexander Archipelago are inland waters, even though they do not meet the legal requirements for inland waters, because they have been historically treated as inland waters. Am. Compl. to Quiet Title ¶¶ 7-9 (Am. Compl.). Count II alleges that the waters also qualify as inland waters on the novel theory that, if certain islands are treated as mainland, the waters would

lie within what Alaska characterizes as several juridical bays. *Id.* ¶ 25. According to Alaska, under those theories, the submerged lands located beneath those alleged juridical bays, or within 3 nautical miles seaward of the limits of those alleged juridical bays, passed to the State under the equal footing doctrine and the SLA. *Id.* ¶¶ 15, 38.

Counts III and IV address the question whether the United States retained title to some of the submerged lands at issue; and thereby prevented them from passing to Alaska under the equal footing doctrine and the SLA. Alaska asserts in Count III that the United States did not retain submerged lands on account of the creation and enlargement of the Tongass National Forest, Am. Compl. ¶ 44, while Alaska asserts in Count IV that the United States did not retain submerged lands on account of the creation and enlargement of Glacier Bay National Monument, which now is part of Glacier Bay National Park and Preserve, *id.* ¶¶ 59-61. See Rep. 4.

On cross-motions for summary judgment, the Special Master rejected Alaska's claims of title to submerged lands under Counts I, II, and IV. See Rep. 1, 294. The Master concluded that the waters within the Alexander Archipelago are not historic inland waters (Rep. 9-138), that the supposed juridical bays that Alaska identified in its amended complaint do not qualify as such (Rep. 138-226), and that the United States did retain the submerged lands within Glacier Bay National Monument (Rep. 227-276). The Master also concluded that the United States has properly disclaimed retention of title to submerged lands within the Tongass National Forest insofar as any such claim is based on the creation or expansion of the Tongass National Forest, that the disclaimer moots Alaska's motion for summary judgment on Count III of its amended complaint, and that the entry of the disclaimer would require dismissal of Count III for lack of jurisdiction. Rep. 276-294.

SUMMARY OF ARGUMENT

The Special Master's thorough and comprehensive report correctly resolves Alaska's claims to ownership of marine submerged lands in the vicinity of the Alexander Archipelago. The Master recognized that Alaska, like other coastal States, is generally entitled to submerged lands within 3 miles of its coast line. The Master rejected, however, Alaska's flawed historic and juridical theories that would go further and grant Alaska title to pockets and enclaves of submerged lands more than 3 miles from shore. The Master also recognized that, upon Alaska's entry into the Union, the United States granted the State most of the federally-owned submerged lands within that 3-mile belt. The Master rejected, however, Alaska's improbable contention that the United States relinquished submerged lands within what was then Glacier Bay National Monument and is now Glacier Bay National Park and Preserve. The Master correctly determined that the United States retained all of the Monument, including the submerged lands beneath Glacier Bay itself, to preserve, protect, and allow scientific study of the Monument's unique and treasured natural features, including the tidewater glaciers, remnants of interglacial forests, and flora and fauna that are integrally associated with the submerged lands.

Although Alaska rightly notes that the Alexander Archipelago encompasses a vast area, only a small portion of the associated submerged lands—the pockets and enclaves at issue in Counts I and II and the Glacier Bay submerged lands at issue in Count IV—is actually in dispute. See Rep. 10-11, 302 (map). Contrary to Alaska's exceptions, the Master applied largely settled law to uncontested facts to reach analytically sound conclusions that comport with historic fact, geographic reality, and common sense. The United States addresses Alaska's exceptions in the same logical order that the Master followed in preparing his report.

1. Alaska contends that it is entitled to pockets and enclaves of submerged lands more than 3 miles from shore on the theory that the whole of the Alexander Archipelago should be viewed as an "historic ba[y]." See Convention Art. 7(6), 15 U.S.T. 1609. Alaska acknowledges (Br. 22) that the Special Master identified the correct legal standard for assessing historic inland waters claims: Alaska must show that the United States exercised the power to exclude all foreign vessels from the area and did so continuously with the acquiescence of foreign nations. Rep. 13-14. The Master's exhaustive analysis of the historic record, Rep. 23-138, which specifically focused on the *best* evidence that Alaska could muster, Rep. 115-125, demonstrates that Alaska cannot satisfy that standard, Rep. 129-135, 137-138. Alaska challenges the Master's conclusion based on isolated incidents that have, at best, inconclusive historic significance. See AK Br. 22-37. The Master's report itself squarely answers each of Alaska's objections.

2. Alaska alternatively contends (Br. 37-50) that it is entitled to pockets and enclaves of submerged lands more than 3 miles from shore on the theory that the whole of the Alexander Archipelago should be viewed as two huge—but heretofore unnoticed—juridical bays. See Convention Art. 7, 15 U.S.T. 1609. The Master correctly rejected Alaska's extraordinary contention. He demonstrated that Alaska wrongly seeks to characterize a series of discrete islands, separated by navigable channels, as extensions of the mainland. Rep. 138-198. The Master further concluded that, even if the islands were imagined to be mainland, they would not result in creation of anything that would qualify in law as a juridical bay. Rep. 198-226.

3. Alaska also contends (Br. 10-21) that it is entitled to the submerged lands within Glacier Bay National Monument. The Master applied the controlling principles set forth in *United States* v. *Alaska*, 521 U.S. 1 (1997), and correctly

rejected Alaska's contention. The Master concluded, based on the Monument's boundary description and its purposes, that the United States had clearly reserved those submerged lands as part of the Monument. Rep. 227-264. He further concluded that Congress clearly expressed its intention, in Section 6(e) of the Alaska Statehood Act (ASA), 72 Stat. 340, to retain the submerged lands. Rep. 264-276. The Master explained that Section 6(e) retains federal reservations, including the submerged lands therein, that had been set aside for "the protection of wildlife" and that the Monument had been set aside for that purpose. Rep. 272-273. He specifically rejected, as inconsistent with *Alaska*, Alaska's contentions that application of Section 6(e) depends on which subdivision of the Interior Department manages the refuge or whether the reservation's "sole purpose" was wildlife conservation under certain federal statutes. Rep. 267-276.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE WATERS OF THE ALEXANDER ARCHIPELAGO ARE NOT HISTORIC INLAND WATERS

A. The Special Master's Analysis

The Special Master rejected Alaska's historic inland waters claim based on his exhaustive study of the extensive record that the parties submitted on the characterization and usage of the waters of the Alexander Archipelago. The Master first conducted an "overview" of Alaska's claim, describing the geographic characteristics of the waters at issue, and the Court's past treatment of historic waters claims. Rep. 10-13. He next identified the Court's test for historic inland waters claims:

> [W]here a State within the United States wishes to claim submerged lands based on an area's status as historic inland waters, the State must demonstrate that the

> United States: (1) exercises authority over the area; (2) has done so continuously; and (3) has done so with the acquiescence of foreign nations.

Rep. 13-14 (quoting *Alaska*, 521 U.S. at 11 (citation omitted)). The Master recognized that, to meet that test, "the exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation." Rep. 14, 109 (quoting *United States* v. *Alaska*, 422 U.S. 184, 197 (1975) (*Alaska (Cook Inlet)*)).

The Master next determined that resolution of the dispute on motions for summary judgment was appropriate. Rep. 17-22.[2] He then conducted a detailed examination of documents from 1821 to the present, which constitute the historic record. Rep. 23-107. He organized his examination over five distinct historic periods: (1) Russian sovereignty (1821-1867) (Rep. 23-38); (2) early American sovereignty (1867-1903) (Rep. 38-55); (3) the 1903 U.S.-Britain Boundary Arbitration (Rep. 56-63); (4) later American sovereignty (1903-1959) (Rep. 63-89); and (5) the post-statehood era (1959-present) (Rep. 89-107). Based on that detailed examination, he identified and analyzed the evidence that best supported the parties' respective positions (Rep. 107-128).

The Master concluded that "Russia and the United States historically did not assert authority to exclude vessels from

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[2] The Master noted that: (1) "on nearly every relevant point, the parties do not dispute the material historic facts," but instead "contest the significance or proper interpretation of undisputed facts" (Rep. 20); (2) "even on the few points as to which a factual dispute appears to exist, a closer look reveals that the problem is simply that the available historic evidence is less than complete and that the parties' dispute is still really over the interpretation of the available undisputed facts" (*ibid.*); and (3) the parties' voluminous record exhibits "appear to include all of the evidence that the parties have been able to compile with regard to count I" (Rep. 21). The Master concluded that, under the circumstances, conducting a trial, in which the same evidence would be submitted to the same decisionmaker, would serve no useful purpose and that a resolution through summary judgment is therefore appropriate. Rep. 21-22.

making innocent passage through the waters of the Alexander Archipelago." Rep. 109. He determined that "Alaska, at best, has uncovered and presented only 'questionable evidence' that the United States exercised the kind of authority over the waters of the Archipelago that would be necessary to prove a historic waters claim." Rep. 129. He further concluded that Alaska's inability to establish "this essential element of its historic inland waters claim," by itself, "constitutes a sufficient basis for recommending that the Court award summary judgment to the United States on count I of the complaint." *Ibid.* See Rep. 137-138.

B. The United States' Reply To Alaska's Exception

Alaska challenges the Master's rejection of the State's historic inland water claim, arguing that he gave insufficient weight to particular historic incidents. AK Br. 22-37. The Master correctly determined that those incidents have, at best, inconclusive significance. The United States agrees and responds to Alaska's jumbled series of objections in the same logical chronology that the Master employed.

1. Alaska Has Failed To Show That Russia And The United States Exercised Sufficient Sovereign Authority Over The Archipelago Waters To Establish An Historic Inland Waters Claim. Since Russia first laid claim to Alaska, foreign nations have freely navigated the waters of the Alexander Archipelago. Alaska's claim that those waters should nevertheless be treated as historic inland waters depends on a handful of ambiguous statements and inconsequential events occurring over a period of more than 150 years. Alaska's evidence, whether viewed individually or taken as a whole, does not demonstrate that either Russia or the United States asserted "the power to exclude all foreign vessels and navigation." Rep. 14, 109 (quoting *Alaska (Cook Inlet)*, 422 U.S. at 197).

a. The Dryad, Loriot, And Chichagoff Incidents (1834-1336). Alaska claims (AK Br. 29-31) that Russia asserted the

power to exclude foreign vessels during the period, from 1821 to 1867, when Russia exercised sovereignty over the Alexander Archipelago as part of the Russian Possessions in North America. Alaska relies (Br. 29-31) on three incidents, arising between 1834 and 1836, relating to disputes over the interpretation of Russian-British and Russian-American treaties.[3]

As the Master explained, Russia entered into treaties with the United States in 1824 and Great Britain in 1825 that authorized citizens of the United States and Great Britain to enter recognized inland waters and set foot on shore within Russian America for a 10-year period to engage in trading and fishing—activity that went beyond the right of innocent passage. Rep. 25-30. Those treaties cannot form the basis of an historic inland waters claim because Russia asserted no right in those treaties to restrict either nation from making innocent passage through the Archipelago to reach those inland waters and shore. *Ibid.* To the contrary, the Russian-British Treaty necessarily *assumed* that British ships were entitled to traverse Archipelago waters to reach inland waters, such as the Stikine River, that were the subject of the treaty. Rep. 28-29, 114. Alaska's contrary claim rests on its misunderstanding of three events that occurred between 1834 and 1836.

In the first incident, a Russian brig stopped a British trading vessel, the *Dryad*, from proceeding up the Stikine River. See Rep. 30-31. As the Master explained, that incident "does not define Russian policy with respect to navigation of either

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[3] Alaska does not challenge the Master's conclusion that Czar Alexander I's Ukase of Sept. 4, 1821, which purported to exclude foreign vessels from approaching within 100 Italian miles of the Russian-American coast, does not provide a basis for an historic inland waters claim. See Rep. 24-25. As this Court has itself ruled, the ukase cannot support an historic inland waters claim because it "was unequivocally withdrawn in the face of vigorous protests from the United States and England." Rep. 24-25 (quoting *Alaska (Cook Inlet)*, 422 U.S. at 191 n.11).

the Stikine River or the waters of the Archipelago" because Russia's government "did not admit that the incident had happened, and assured Britain that no interference would occur in the future." Rep. 31-32. Alaska cites the *Dryad* incident (Br. 30 n.18), but the State does not dispute that the apparent cause of this isolated incident was that the ship captains encountered "language difficulties." Rep. 30, 31 (citing Exh. US-I-2 p.21).

In the second incident, the Russian brig *Chichagoff* patrolled the southern border of Russian America in March 1835 to intercept foreign vessels for the purpose of "deliver[ing] written notice of the expiration of the treaty provisions" that had allowed American and British ships to fish and trade with natives. Rep. 32 (quoting Exh. AK-13 p.70). The Master correctly concluded that the Russian brig did no more than "provide traders with notice of the expiration of the treaties. Rep. 33. Alaska argues that the *Chichagoff* conducted a "blockade" (Br. 30), but the Master correctly rejected that speculation, finding no evidence that the *Chichagoff* "sought to prevent foreign vessels from making innocent passage through the waters of the Alexander Archipelago." Rep. 33. As the Master recognized, Russia did not suspend the right of innocent passage by forbidding traders from entering Russian ports, setting foot on Russian territory, or engaging in proscribed fishing and trading activities. *Ibid.*[4]

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[4] The Convention expresses the historical understanding that innocent passage "includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress." Art. 14(3), 15 U.S.T. 1610. It does not include passage that is "prejudicial to the peace, good order or security of the coastal State" or that violates the coastal nation's fisheries laws. Art. 14(4) and (5), 15 U.S.T. 1610. A nation is entitled to "take the necessary steps in its territorial sea to prevent passage which in not innocent." Art. 16(1), U.S.T. 1611. See US-I Opp. 4; 4 M. Whiteman, *International Law* 343-371 (1965) (discussing innocent passage).

In the third incident, a Russian brig stopped the American vessel *Loriot*, which had made land in Russian America in late 1836, and ordered that vessel to leave Russian waters. Rep. 33-37. As the Master explained, the report of that incident establishes that the *Loriot*, which had entered the Russian harbor of Tuckessan and later sought to enter the Russian harbor of Tatesky for the purpose of trading, was not engaged in innocent passage and was therefore subject to exclusion. Rep. 34-37. Alaska contends (Br. 30-31) that the Master "merely speculated" that the Russian brig repelled the *Loriot* from "waters within the distance of a cannon shot [viz., the territorial sea]" (Rep. 37). Alaska, however, bears the burden of establishing that Russia excluded the vessel—which was plainly not engaged in innocent passage—from an area within the Archipelago that would constitute territorial or high seas. The record demonstrates only that the *Loriot* impermissibly entered the inland waters of Russian harbors for the purpose of pursuing proscribed activity and that Russia permissibly exercised its right of exclusion. Rep. 36-37; note 4, *supra*; US-I Opp. 10-11.

In sum, Alaska has produced no evidence that Russia continuously attempted to exclude vessels from innocent passage through the waters of the Alexander Archipelago during the period of Russian sovereignty. See US-I Memo. 32-33; US-I Opp. 6-11; US-I Reply 5-8.

b. The Letter From Secretary Of State Thomas F. Bayard (1886). Alaska's exception does not put forward any affirmative evidence that the United States prevented innocent passage during the period of early American sovereignty (1867-1903). Rather, Alaska attempts only to overcome convincing affirmative evidence to the contrary. Secretary of State Bayard's 1886 letter to Secretary of the Treasury Manning (Exh. US-I-6) expressly states that the United States claims only a traditional 3-mile territorial sea along the coast of Alaska. See Rep. 45-49. The Master con-

cluded that this document, which "unambiguously support[s]" the United States' position, is especially persuasive because it is an express contemporaneous statement from the Secretary of State himself articulating "the official position of the State Department" that foreign vessels could make "free transit" through the Alexander Archipelago. Rep. 45-47, 109-110. "Officials who held this belief could not, and evidently did not, claim that the United States could exclude innocent passage through the waters." Rep. 110.[5]

Alaska argues (Br. 31-32) that Secretary Bayard's letter is "hardly probative" because "it was internal correspondence that primarily addressed a dispute on the East Coast" and did not put foreign nations on notice of the American position. The Master correctly rejected those contentions. Secretary Bayard's 11-paragraph letter sets out the official position of the United States with respect to both the Atlantic and Pacific coasts, noting that the government must maintain a consistent international position on each shore. Rep. 45-49, 109-110. The letter, which was made available to the world, see 1 J. Moore, *Digest of International Law* 718-721 (1906), notes that the United States had "asserted" those rights against Russia and anticipated that foreign nations would expect reciprocal respect of their rights. Rep. 47.

In short, Alaska cannot overcome the obvious import of Secretary Bayard's letter. Furthermore, Alaska has no basis, even apart from Secretary Bayard's letter, for claiming that the United States took any action between 1867 and

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[5] Secretary Bayard's letter specifically underscores that the United States: (1) had consistently claimed a territorial sea of only 3 miles (Exh. US-1-6 pp.14a-16a); (2) measures the territorial sea from the shores of the mainland and the islands and not from lines connecting islands (*id.* at 16a); (3) recognizes the right of innocent passage through its territorial sea (*id.* at 18a); and (4) refused to recognize Russian jurisdiction beyond 3 miles of the shores of Alaska and cannot, therefore, "claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase" (*ibid.*). See Rep. 45-49.

1903 that would give rise to an historic inland waters claim. See Rep. 49-55; US-I Memo. 32-33; US-I Opp. 11-14.

c. The Proceedings Of The Alaska Boundary Tribunal (1903). Alaska predicates its historic inland water claim primarily on several statements that it has extracted from the 7-volume *Proceedings of the Alaska Boundary Tribunal*, S. Doc. No. 58-162 (1903-1904) (*ABT Proc.*). See AK Br. 22-24. The ABT convened to resolve a dispute between the United States and Britain over the *land* boundary between Alaska's southeastern panhandle and Canada. Rep. 58.[6] Alaska contends that the United States' counsel made statements in those proceedings that support Alaska's historic inland waters claim. The Master interpreted the counsel's statements to express the view that the "political coast line" of Alaska runs along the outside edge of the Alexander Archipelago, Rep. 56-63, but the Master ultimately concluded that those statements are not a legally sufficient assertion of authority to establish an historic waters claim, Rep. 116-119.[7]

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[6] As the Master noted (Rep. 56), the report of the special master in the *Alaska* litigation "provides a concise and accessible summary of [the ABT] proceedings." See Report, *Alaska*, No. 84 Orig., at 61-65 (Mar. 1996).

[7] The United States disagrees with the Master's characterization of the counsel's statements as expressing an authoritative position of the United States. See Rep. 61. The counsel's statements, read in context, merely attempted to show that, if Britain's arguments in that case were accepted, they would lead to the absurd consequence that the Alexander Archipelago would have two political boundaries. See US-I Memo. 22-27; US-I Opp. 14-17; US-I Reply 10. The counsel did not purport to make a maritime claim, and his written brief was careful to point out, under the argument heading, "The Political Coast Line Not Involved In This Case," that "[t]he artificial coast line created by international law for purposes of jurisdiction only, which, following the general trend of the coast, cuts across bays and inlets is not involved in this case in any form." Exh. US-I-30, Pt. 1, at 17-18. See US-I Memo. 27; US-I Opp. 16; US-I Reply 10. Moreover, other government statements from that period contradict any suggestion that counsel may have made that the United States draws 10-mile closing lines around coastal archipelagos. US-I Memo. 15-16. This Court, however, need not resolve the proper characterization of the counsel's statements. As the Master concluded, those statements, even when

Alaska challenges the Master's conclusion (Br. 22-24), contending that the counsel's statements—which referred to a coast delimitation theory that was inconsistent with U.S. practices before and after the ABT proceedings (*e.g.*, Rep. 45-49, 63-65, 69-71, 72-75)—were sufficiently public that foreign nations, other than Britain, would have been aware of a United States claim. The Master, however, has fully answered Alaska's objections, explaining why the statements of counsel before the ABT were an inadequate foundation for an extraordinary international claim:

> The status of the waters of the Alexander Archipelago was not at issue before the Tribunal. The Tribunal did not discuss the arguments of counsel or rule on their validity. The arguments take up only a few paragraphs in a seven volume record. For these reasons, it would be unrealistic to conclude that counsel's assertions at the tribunal should have made foreign nations (other than Britain) aware that the United States was asserting a right to exclude them.

Rep. 118.[8] The Master's reasoning is especially compelling in light of the precedent that a contrary conclusion would set. As the Master pointed out, if this Court were to recognize an historic inland waters claim on so fragile a basis, the United States would itself become vulnerable to similarly weak

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interpreted as Alaska urges, are insufficient to establish an historic inland waters claim. Rep. 118-119.

[8] Alaska notes (Br. 23) that Norwegian counsel discovered and cited the United States counsel's statements during a 1951 dispute with Britain over the scope of Norway's inland waters. But that was nearly 50 years later and, as the Master pointed out, the United States had made clear to Norway *in 1949* that the United States did *not* claim the Archipelago waters as inland. Rep. 84-85; US-I Memo. 41-42. In any event, "[t]he ability of one foreign nation to discover the United States' argument when litigating a related issue * * * does not mean that foreign nations should have known of the United States' position." Rep. 118 n.34. Alaska has produced no evidence that those involved in actual navigation of the Archipelago waters knew of, or relied on, the counsel's statements.

claims by other nations that would restrict the freedom of the seas. Rep. 118-119. See US-I Memo. 21-24.

d. Fisheries Enforcement And The Marguerite Incident (1924). Alaska challenges (Br. 25-29) the Master's rejection of its argument that the federal government's enforcement of fisheries regulations in the Alexander Archipelago, and in particular its seizure of a Canadian fishing vessel, the *Marguerite*, supports an historic inland water claim. The Master noted that "Alaska presents no definitive examples of actual enforcement of fishing regulations against foreign nationals within the [Archipelago's] pockets and enclaves." Rep. 119. In the only example that Alaska offered—the seizure of the *Marguerite*—the location of the seizure "remains unsettled." *Ibid.*; see Rep. 66-68. The Master correctly recognized that, in any event, the federal government's enforcement of fisheries regulations is immaterial because "even if Alaska could prove the factual premise of its argument— that the United States enforced fishing regulations in the pockets and enclaves at issue—this proof would not lead to the conclusion that the United States regarded the waters of the Archipelago as inland waters or territorial sea." Rep. 120-121. As this Court ruled in *Alaska (Cook Inlet)*, the federal government's fisheries enforcement jurisdiction "frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters." 422 U.S. at 198-199. See Rep. 120-121.[9]

Alaska first challenges (Br. 27) the Master's determination that "[t]he record does not establish with clarity where the Coast Guard seized the *Marguerite*." Rep. 67. Alaska concedes (Br. 27 n.17) that "[t]he Coast Guard initially de-

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[9] For example, the United States currently maintains an Exclusive Economic Zone extending 200 miles from the United States coast and prohibits foreign fishing, without permission, within that zone. 16 U.S.C. 1811 *et seq.* The federal government's enforcement of that prohibition cannot support an historic inland waters claim because the United States continues to allow passage through those waters. See note 4, *supra*.

scribed the seizure as having occurred at a non-existent location." See Rep. 67-68; US-I Opp. 19; Exh. US-I-20. But Alaska contends (Br. 27) that a "contemporaneous Coast Guard map" shows "precisely where the *Marguerite* was intercepted, in an area unquestionably more than three miles from land." See Exh. AK-462 (reproduced at AK Br. 10a). That map, however, was prepared long after the incident, and the Master correctly concluded, in light of the Coast Guard's inconsistent positions, that Alaska failed to establish that the Coast Guard seized the *Marguerite* for fishing within a pocket or enclave. Rep. 67, 119. See US-I Opp. 18-20.[10]

More generally, Alaska is wrong in contending (Br. 28-29) that fisheries enforcement that discriminates against foreign vessels supports an historic inland waters claim. As the Master explained, Alaska based that contention on an erroneous reading of a passage from this Court's decision in *Alaska (Cook Inlet)*, 422 U.S. at 197-198. See Rep. 121-122. The Court did not state that a government's prohibition of foreign vessel fishing alone manifests an inland waters claim; rather "the Court simply recognized that the Alien Fishing Act was the only law cited in the case that clearly applied to foreign vessels." Rep. 121. Alaska's distinction, moreover, makes no sense; a nation can prohibit foreign fishing in its territorial waters, and beyond, without restricting innocent

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[10] Alaska is mistaken in characterizing Exh. AK-462 as a "contemporaneous map." The Coast Guard plotted the seizure on an edition of the U.S. Coast and Geodetic Survey Chart 8102 that was published in October 1925, at least 15 months after the *Marguerite* incident. See Exh. AK-461. (Exh. AK-462 is derived from Exh. AK-461, but does not include the chart's publication and issuance dates.) The Coast Guard apparently prepared the plot long after the incident took place, presumably in response to a British protest. See Rep. 67; Exh. AK-461. The British protest underscores that, even if the *Marguerite* were seized for fishing in a pocket or enclave, foreign nations did not acquiesce in any claim that the seizure was legitimate. Rep. 132. And of course, an isolated enforcement action would not satisfy the requirement of a continuous assertion of sovereignty for an extended period.

passage, which is the prerequisite for an inland waters claim. See Rep. 120-122; notes 4 & 5, *supra*; US-I Opp. 18.[11]

Alaska's reliance on the United States' fisheries enforcement and the *Marguerite* incident is especially infirm when considered against the United States' repeated refusal, from 1903 until Alaska's statehood, to treat the waters of the Alexander Archipelago as inland waters. Of particular significance, the Departments of Commerce and State exchanged letters expressing their joint position that the Archipelago waters are not inland waters. Rep. 70-71, 110-111. The Master's report answers Alaska's remaining arguments from that era, amply demonstrating that the historic record is fatal to Alaska's claims. Compare AK Br. 26, with Rep. 110-112, 127-128. See US-I Memo. 33-38; US-I Opp. 18-26.

e. Post-Statehood Evidence (1959 to Present). Alaska makes mention (Br. 24, 27) of several post-statehood documents, including judicial proceedings culminating in *Metlakatla Indian Community* v. *Egan*, 362 P.2d 901 (Alaska 1961), government statements in a Supreme Court brief in *United States* v. *California*, 381 U.S. 139 (1965) (Exh. US-I-6

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[11] Alaska's quotation (Br. 29) from a United Nations study provides no support for its contention. That study merely indicates that a nation's continuous assertion of exclusive fishing rights might give rise to an historic fisheries claim, not an historic inland waters claim. *Ibid.* Alaska's reference to the Court's recounting of the Shelikoff Strait incident (Br. 28) in *Alaska (Cook Inlet)* also provides no support for its contention. The Court "scutini[zed]" Alaska's 1960 seizure of a Japanese vessel "more than three miles from shore" because the State's seizure in that case was evidence of *Alaska's* "assertion of sovereignty to exclude foreign vessels altogether." 422 U.S. at 201. The Court determined from the record that, at the time of the seizure, "Alaska clearly claimed the waters in question as inland waters," *id.* at 203, and Alaska justified the seizure on *that* basis, see 73-1888 App. 1186. But the Court concluded that Alaska's assertion of authority was insufficient to establish that the United States claimed those waters as inland waters because "the United States neither supported nor disclaimed the State's position." 422 U.S. at 203. The Court did not suggest that any seizure of a vessel beyond the 3-mile limit would necessarily constitute an inland waters claim. Rather, it specifically rejected that contention. See *id.* at 198-199.

pp.130-131), and statements purporting to show government use of the so-called Pearcy charts for fisheries enforcement purposes (Exhs. AK-103 to AK-107). The Master correctly explained that those documents are inconsequential.

The Master carefully examined the *Metlakatla* decision, which affirmed a post-statehood trial court ruling, entitled *Organized Village of Kake* v. *Egan*, 174 F. Supp. 500 (D. Alaska, Terr. 1st Div. 1959), that the Archipelago waters are historic inland waters. Rep. 89-96. He noted that this Court has previously held that state supreme court decisions regarding historic inland waters are not controlling, Rep. 122-123 (citing *California*, 381 U.S. at 173-175), and he concluded that the Alaska Supreme Court's superficial analysis "is not persuasive," Rep. 123. The Master also found that the government's statements in the 1964 Supreme Court brief in *California*, *supra*, which mistakenly characterized the Archipelago's passages as straits leading only to inland waters, had "little relevance" because the character of those waters was not at issue in that case and the misstatements played no role in the Court's decision. Rep. 96-99, 123-124. Finally, the Master concluded that the Pearcy charts "do not support Alaska's claim" because the United States did not adopt them and Alaska's exhibits "do not identify any specific enforcement actions taken in reliance on those charts." Rep. 99-101, 128. See US-I Opp. 32; US-I Reply 12-15.

The Master correctly concluded that two other considerations are far more relevant. First, no published list of the world's historic waters has ever included the Alexander Archipelago waters. Rep. 88-89, 111. The world would not overlook a claim so vast and significant to international traffic. Rep. 111-112. Second, the United States has expressly informed the world, through its 1971 publication of coastal charts, that it does *not* claim the waters of the Alexander Archipelago as inland waters. Rep. 101-103, 112-114. The Master correctly concluded that Alaska's evidence, taken as

a whole, is insufficient to overcome that international disclaimer, which is entitled to a presumption of validity. Rep. 129. As the Master further observed, Alaska cannot prove that the United States claimed the right to exclude innocent passage within the Archipelago even under a less demanding preponderance-of-the-evidence standard. *Ibid.* Alaska's failure of proof on that point, by itself, warrants granting the United States summary judgment on Count I. *Ibid.*

2. Alaska Cannot Meet The Other Requirements For Establishing An Historic Inland Waters Claim. The Master found that, because Alaska cannot establish the requisite assertion of sovereign authority, it cannot establish a continuous exercise of that authority or foreign acquiescence. Rep. 129-133. He further noted Alaska cannot show that the United States' "vital interests" weigh in favor of Alaska's claim. Rep. 133-135. Alaska's contentions to the contrary are without merit.

a. Continuity. This Court's decisions and past special masters' reports indicate that, to establish an historic waters claim, a nation must continuously assert that claim for at least a century. See Rep. 130; US-I Opp. 32-40. The Master correctly concluded that Alaska's claim that the United States continuously excluded innocent passage from 1903 to 1959, even if substantiated, was of insufficient duration. Rep. 130-131. Alaska now contends (Br. 31) that its evidence should be viewed a continuous assertion of sovereign authority during the period from 1903 to 1971. Even if Alaska's claim could be lengthened by 13 years, it still falls nearly one-third short of the century standard. Of course, the fact remains that Alaska has failed to show *any* sufficient assertion of sovereign authority—much less a single, consistent, and continuing theory for exclusion—on which to base its claim. To the contrary, the Inside Passage of the Archipelago is an international route of travel that, for much of its

history, has been dominated by foreign vessels. See US-I Opp. 38-40.

b. Foreign Acquiescence. The Master pointed out that, because "Russia and the United States did not sufficiently assert authority over the waters of the Alexander Archipelago, it follows that foreign nations could not acquiesce." Rep. 131. He went on to note the complete failure of Alaska's proof on this point. Rep. 131-133. Alaska simply repeats (Br. 34) the flawed evidence that the Master rejected, and his report is sufficient, by itself, to rebut Alaska's arguments. See Rep. 132-133. See also US-I Memo. 40-44; US-I Reply 19-20. As the Master observed, "Alaska has not produced any statement by the government of any nation confirming that it would acquiesce in exclusion of its vessels from the waters of the Alexender Archipelago," and "Alaska also has not presented any opinion from any expert in the law or policy of any foreign nation on the question whether the foreign nation would acquiesce." Rep. 132. See US-I Memo. 8-9.

c. Vital National Interests. The Master correctly concluded that "recognizing the waters of the Alexander Archipelago as inland waters is not vital to the interests of the United States." Rep. 135. Alaska's contentions to the contrary (Br. 36) are without merit. As the Master explained, the United States does not stand to gain commercially or militarily from excluding foreign vessels from the Archipelago waters. Rep. 134-135. To the contrary, if the Court were to validate Alaska's plainly deficient historic inland waters claim, the Court would create a significant adverse international precedent restricting the freedom of the seas. Foreign nations might use that precedent to exclude United States vessels from strategically important offshore waters and correspondingly impair the United States' ability to protect its vital overseas interests. See US-I Memo. 9-10; US-I Opp. 27-29; US-I Reply 19-20.

II. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE WATERS OF THE ALEXANDER ARCHIPELAGO DO NOT CONSTITUTE TWO HERETOFORE-UNNOTICED JURIDICAL BAYS

A. The Special Master's Analysis

The Master also rejected Alaska's alternative argument that the State is entitled to the submerged lands beneath the pockets and enclaves within the Alexander Archipelago. Alaska's argument hinges on the extraordinary theory that the collection of straits that separate the Archipelago's islands from each other and the mainland should be treated, contrary to their actual physical characteristics, as two huge juridical bays. Alaska discovered those imaginary bays, which it has christened "North Bay" and "South Bay," after it filed this original action. Alaska amended its complaint, without objection from the United States, and the Master determined on cross-motions for summary judgment that "North Bay" and "South Bay" (as well as two smaller proposed-but-abandoned bays) do not exist. Rep. 138-226.

The Master first conducted an overview of the controlling legal principles. Rep. 138-142. See US-II Memo. 4-10; US-II Opp. 31-33. He explained that a juridical bay is "a body of water having geographic features that satisfy criteria specified in article 7 of the Convention." Rep. 138. He further explained that Alaska must prevail on "two general issues" to succeed on its theory. Rep. 140. First, Alaska must establish that the islands it wishes to treat as mainland "can be 'assimilated' to each other or to the mainland to form the sides of the alleged juridical bays." *Ibid.* Second, Alaska must establish that the alleged "bays" that result "meet the requirements stated in article 7." *Ibid.* The Master concluded, and neither party contested, that those issues can be appropriately resolved through motions for summary judgment. Rep. 141-142.

The Master next reviewed the physical characteristics of the area at issue. Rep. 142-147. He then conducted a detailed assessment of whether assimilation was appropriate for each island in question, applying the principles that this Court identified in *United States* v. *Maine*, 469 U.S. 504, 514-520 (1985), and *United States* v. *Louisiana*, 394 U.S. 11, 60-66 (1969). Rep. 147-197. The Master determined that assimilation was inappropriate except in the case of two inconsequential channels that "do not suffice to create the juridical bays alleged by Alaska." Rep. 197. He accordingly concluded, on that basis alone, that the United States was entitled to summary judgment. Rep. 198.

The Master nevertheless analyzed whether, if assimilation were appropriate, the resulting water bodies would "have configurations satisfying the criteria for juridical bays under article 7." Rep. 198. See Rep. 198-226. He concluded that, even if the islands could be assimilated, neither "North Bay" nor "South Bay" would qualify as a juridical bay because neither meets Article 7(2)'s requirement that the proposed bay constitute a "well-marked indentation." Rep. 222.

B. The United States' Reply To Alaska's Exception

Alaska challenges the Master's conclusions on three bases. First, Alaska contends, contrary to the Master's detailed analysis, that this Court's decision in *Maine* supports assimilation of the islands that Alaska proposes to treat as part of the mainland. AK Br. 45. Second, Alaska contends that the resulting land forms, "North Bay" and "South Bay," would constitute sufficiently "well-marked indentations" to qualify as juridical bays. *Id.* at 45-49. Third, Alaska contends, more broadly, that the "rationale for bay recognition" and the "nature of the areas" favor juridical bay status. *Id.* at 49-50. As the United States explained in great detail in its briefs on summary judgment, those arguments are without merit.

1. This Court's Decisions Preclude Alaska's Proposed Assimilations. This Court's decisions recognize that, in

exceptional circumstances, islands may be treated as part of the mainland for purposes of applying the Convention's bay-delimitation principles. See *Maine*, 469 U.S. at 517-519 (approving assimilation of Long Island to New York); see also *Louisiana*, 394 U.S. at 61-65. As the Master explained, the Court has employed "a 'realistic' and 'common sense' approach," considering a variety of geographic, physical, and socio-economic factors that bear on the relationship between the islands and the mainland. Rep. 148-149 (quoting *Lousiana*, 394 U.S. at 63, 64), 151-152. The Master identified those factors (Rep. 153-177) and applied them to each of the islands that Alaska contends should be assimilated (Rep. 177-197). His report contains a chart (Appendix E), showing those islands and the intervening waters. Rep. 306 (Exh. US-II-10). The Master correctly concluded that Kuiu Island cannot be assimilated to Kupreanof Island (Rep. 177-181), Kupreanof Island cannot be assimilated to Mitkof Island (Rep. 181-185), and Dry Island cannot be assimilated to the mainland (Rep. 189-193).[12]

a. Kuiu Island—Kupreanof Island (Keku Strait). The Master correctly concluded that Kuiu and Kupreanof Islands cannot be assimilated, primarily because the waterway that separates them—the generally deep and easily navigable 41-mile-long Keku Strait—is too substantial to be ignored. Rep. 177-181. Alaska does not challenge the Master's determination that Keku Strait, taken as a whole, would preclude assimilation. Instead, Alaska contends (Br. 43) that the

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[12] The Master concluded that "assimilation is warranted between Dry Island and Mitkof Island and between Partofshikof Island and Kruzof Island." Rep. 197. The United States believes that the Master erred in concluding that Dry Island could be assimilated to Mitkof Island because he overlooked the most recent nautical chart (NOAA Chart 17360 (31st ed. Mar. 27, 1999)), which shows a channel at low-water between those islands. Compare Rep. 186, with US-II Reply 18-19. The Court need not reach that issue, however, because that assimilation would "not suffice" to create Alaska's proposed juridical bays. Rep. 197.

Master erred because he did not limit his focus to the 18-mile portion of that channel called "Rocky Pass," which is generally narrower and shallower than the rest of Keku Strait.

The Master carefully considered and correctly rejected Alaska's proposed approach. Rep. 153-160. He concluded that the relevant intervening waters are, as the United States urged, "the entire area across which the two landforms of interest face one another." Rep. 154 (quoting US-II Opp. 7). The Master identified three compelling reasons favoring the United States' approach—it provides certainty, it is not subject to manipulation, and it is consistent with this Court's statements that assimilation is limited to "exceptional" circumstances. Rep. 153-160.[13]

A "mere glance at a map of the region" (*Maine*, 469 U.S. at 514) reveals that the Master's position comports with reality and common sense. See Rep. 306. Kuiu and Kupreanof Islands are separate land forms separated by Keku Strait, a substantial intervening waterway that cannot be realistically ignored. The Master correctly evaluated all of the evidence and properly treated Kuiu and Kupreanof Islands in law as what they are in fact—two distinct islands separated by a navigable strait. Rep. 177-181.

b. Kupreanof Island—Mitkof Island (Wrangell Narrows). The Master similarly concluded that Kupreanof and

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[13] The Master explained that the United States' position provides certainty because it identifies the intervening waters through an accepted objective measure—the "45-degree test"—that the Court has used in other contexts. Rep. 154-158. By contrast, Alaska's position, which identifies the intervening waters through a subjective evaluation of where the waters are "pinched," would inevitably generate controversies over where the intervening waters begin and end. Rep. 155. Because Alaska relies on subjective criteria, its approach is "highly manipulable" and could lead foreign nations to "argu[e] for assimilation of islands that are not 'realistically' parts of other land forms." Rep. 158. And because "Alaska's approach would make assimilation substantially easier than the United States' approach," it would erode the understanding that assimilation is limited to the "'exceptional case.'" *Ibid.* (quoting *Maine*, 469 U.S. at 517).

Mitkof Islands cannot be assimilated, primarily because the waterway that separates them—the heavily-used 15-mile-long Wrangell Narrows—is also too substantial to be ignored. Rep. 181-185. In the case of Wrangell Narrows, Alaska has abandoned its approach of identifying "pinched waters." Rep. 181. Rather, Alaska primarily takes issue (Br. 40-41) with the Master's determination that the waterway has "significant navigational utility" (Rep. 183).

Alaska characterizes Wrangell Narrows as a "shallow, rocky and tortuous channel" (Br. 41), neglecting to describe its *actual* utility. Since the 1800s, Wrangell Narrows has served as a vitally important route for ships of various flags engaged in commercial navigation. For example, as the Master pointed out, even before dredging, Wrangell Narrows was part of "the regular route taken by vessels running to all southeastern Alaska points from the ports on the Pacific coast of the United States and Canada." Rep. 183 (quoting Exh. AK-146).[14] Today, Wrangell Narrows is a part of what Alaska "aptly call[s] the Alaska Marine Highway." AK Compl. Br. 2. It is currently used by large vessels, including "cruise ships, State ferries, barges and freight boats." Rep. 183 (quoting 8 NOAA, *U.S. Coast Pilot* ¶251, at 168 (1999)). See US-II Memo. 36-38.[15]

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[14] In 1902 alone, "the 'large traffic' through Wrangell Narrows included 19,090 passengers and 124,681 tons of cargo." Rep. 183 (quoting Exh. AK-146 p.5). Two steamship companies made 187 transits through the Narrows in one year. *Ibid.* The historic documents show that Wrangell Narrows has long been the favored navigation route for national and international traffic from Seattle to Skagway. See Exh. US-II-31.

[15] The Coast Guard reports that Wrangell Narrows is regularly used by Alaska state ferries of up to 410 feet in length with a 75-foot beam drawing 17 feet; tugs up to 120 feet long and 17 foot draft; barges up to 320 feet long and 22 foot draft with an average length of tow of 500 feet; cruise ships up to 407 feet long and 53 feet across with drafts of 16 feet; and fishing vessels up to 150 feet long drawing 15 feet. Exh. US-II-27 p.3; Exh. US-II-1 p.50.

The Master correctly concluded that Wrangell Narrows conspicuously separates Kupreanof Island from Mitkof Island and precludes assimilation. Rep. 183-185. Wrangell Narrows is an important shipping lane that is heavily used in international commerce as "*a principal channel of navigation*." Rep. 184.[16] That important international sea route cannot be treated as if it were dry land. Contrary to Alaska's contentions (Br. 41-42), Kupreanof and Mitkof Islands also lack a geologic and socio-economic connection, which further weighs against assimilation. See Rep. 185.

c. Dry Island—Alaska Mainland. If Kuiu Island cannot be assimilated to Kupreanof Island, and Kupreanof Island cannot be assimilated to Mitkof Island, then "North Bay" and "South Bay" do not exist, and it makes no difference whether Dry Island can be assimilated to the Alaska mainland. Rep. 193. In any event, that assimilation would be inappropriate. The Master correctly rejected Alaska's contention below that an island can "automatically become part of the mainland, for the purpose of creating a bay," merely because "the island may form part of the coast line." Rep. 191. Alaska does not renew that argument here. Alaska did not attempt to establish before the Master that Dry Island could be assimilated under the analysis set forth in *Maine*. See Rep. 192-193. The Court should accordingly reject Alaska's unsubstantiated (and forfeited) assertion (Br. 44-45) that those factors "all favor assimilation." Alaska's failure to provide a basis for assimilating Dry Island to the mainland is fatal, by itself, to Alaska's associated juridical bay claims.

2. Even If Alaska's Proposed Assimilations Were Appropriate, Alaska's Proposed "North Bay" And "South Bay" Would Not Qualify As Juridical Bays. Alaska chal-

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[16] Alaska's comparison of Wrangell Narrows to the New York's East River is unpersuasive. Wrangell Narrows, unlike the East River, "serves as the principal opening between two bodies of water" and is heavily used by foreign flag vessels, not as a destination, but rather as a route for international transit. Rep. 184-185.

lenges (Br. 46-49) the Master's determination that, assimilation issues aside, neither "North Bay" nor "South Bay" would qualify as a "well-marked indentation" under Article 7 of the Convention (15 U.S.T. 1609). The Master reached the correct result in the case of each supposed bay on essentially the same rationale. He reasoned that an indentation is "well marked" if it possesses "physical features so that a mariner looking at charts that do not show bay closing lines may perceive the limits of the bay and avoid making illegal entry into inland waters." Rep. 215.[17]

To say the least, both North Bay and South Bay lack the characteristic of "geographic obviousness." Rep. 216. The Master agreed with the United States that the juridical bays that Alaska seeks to create in this case "are not only impossible for mariners to identify, but they went undiscovered by numerous geographic experts and Alaska's own legal counsel until after the commencement of this quiet title suit." *Ibid.* (quoting US-II Memo. 20).[18]

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[17] The Master also concluded, correctly, that "South Bay" does not qualify as a juridical bay because its "depth of penetration" is insufficient. See Rep. 223-225. In doing so, the Master correctly rejected Alaska's flawed approach to measuring the mouth of a juridical bay. Compare Rep. 201-205, with AK Br. 47-49. Although the United States agrees with most of the Master's interpretations of Article 7, see US-II Opp. 31-45, it disagrees with his methodology for measuring the endpoint of penetration. See Rep. 207-208. The United States urged that the endpoint should not extend into waterways adjacent to an asserted bay (such as Lynn Canal in the case of "North Bay") that independently qualify as inland waters. US-II Opp. 42. The Master rejected that approach, despite its "logical appeal," based on his understanding of a pre-Convention decision of the International Court of Justice. Rep. 207-210. The United States suggests that resolution of that issue should await a case in which the answer affects the outcome. See Rep. 198 n.53.

[18] For example, explorers consistently identified the Archipelago waters as "straits" and "passages" rather than "bays"; the State Department's renowned geographer S. Whitmore Boggs did not detect "North Bay" or "South Bay" in his extensive studies of the Archipelago waters; the United States' Coastline Committee did not detect them in preparing its 1971 charts of those waters; and Alaska itself did not detect them in

Alaska contends that its proposed bays are discernible if the mariner simply has the perspicacity to detect Alaska's discredited "island peninsula" and the additional foresight to erase, on that basis, the maze of other Archipelago islands from his charts. AK Br. 46. Alaska plainly demands too much of the mariner, who must navigate on the basis of nautical charts and discernible physical features rather than lawyers' theories. The Master correctly concluded that "if the standard is geographic obviousness, then actual charts of the area and the actual record of observation by experienced navigators and geographers must carry more weight than depictions having islands or other features removed." Rep. 217; see Rep. 223.

3. The Principles Governing The Recognition Of Juridical Bays Counsel Strongly Against Alaska's Proposed Bays. Alaska quotes (Br. 49) this Court's statement in *Maine* that "[t]he ultimate justification for treating a bay as internal waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast." *Maine*, 469 U.S. at 519. That consideration weighs decisively in favor of the United States' position. Article 4 of the Convention recognizes that a "fringe of islands," like the Alexander Archipelago, presents a geographic configuration that is not the equivalent of a bay and does not necessarily implicate the interests of the territorial sovereign to the same extent; it accordingly gives the coastal nation the discretion to determine whether that configuration should be enclosed by straight baselines. 15 U.S.T. at 1608. The United States has declined to draw straight baselines, concluding on balance that the national interest is not well served by treating such areas as inland

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objecting to the 1971 charts or even in its initial complaint in this case. Rep. 216-217. See US-II Memo. 16-22.

waters. See US-II Memo. 4-6, 14-17, 22-24. That self-restraint is essential if the United States is to avoid setting precedents that would inhibit this Nation's ability to navigate off foreign shores.

Alaska's extravagant bay definition theories would nevertheless *require* the United States to treat the Alexander Archipelago as inland waters. Those theories do not simply ignore geographic reality; they overlook the most fundamental sovereign interest at issue—the United States' foreign policy interest in maintaining a consistent and coherent approach to coast line delimitation to promote this Nation's longstanding policy of freedom of the seas. If this Court were to adopt Alaska's expansive theories, it would encourage foreign nations to do the same. Those theories would find similar application on analogous foreign coasts, impairing the United States' right of free navigation off other nation's shores. See US-II Memo. 22-24; US-II Opp. 1-3; US-II Reply 1-2, 3-4. In short, not only do Alaska's theories rest on an artificial and unrealistic vision of the geography of the Alexander Archipelago, they also reflect a short-sighted view of the national interests at stake.

III. THE SPECIAL MASTER CORRECTLY DETERMINED THAT THE UNITED STATES RESERVED AND RETAINED TITLE TO THE SUBMERGED LANDS WITHIN GLACIER BAY NATIONAL MONUMENT

A. The Special Master's Analysis

The Master rejected Alaska's remarkable claim that the very heart of Glacier Bay National Park—Glacier Bay and its submerged lands—belongs to the State. The Master began with an historic overview, Rep. 227-229, explaining that President Coolidge invoked the Antiquities Act of 1906, 16 U.S.C. 431, to create Glacier Bay National Monument, Proclamation No. 1733, 43 Stat. 1988 (1925) (1925 Proclamation), and President Roosevelt expanded the Monument to

include more of Glacier Bay and to extend the Monument's western boundary 3 nautical miles out to sea, Proclamation No. 2330, 4 Fed. Reg. 1661 (1939) (1939 Proclamation). President Eisenhower altered the boundary to exclude specifically described uplands and submerged lands. Proclamation No. 3089, 20 Fed. Reg. 2103 (1955) (1955 Proclamation). In 1980, Congress expanded the boundaries and designated the Monument as part of Glacier Bay National Park and Preserve. 16 U.S.C. 410hh-1(1).[19]

The Master then set forth the legal standards that this Court has enunciated in its four most recent decisions addressing title to submerged lands within the boundaries of federal reservations. Rep. 229-230. Those cases create a "two-step test" of congressional intent to retain submerged lands in federal ownership. *Idaho* v. *United States*, 553 U.S. 262, 273 (2001). The two-step test is satisfied when an Executive reservation clearly includes submerged lands and Congress recognizes the reservation in a way that demonstrates an intent to retain title. *Alaska*, 521 U.S. at 45.

The Master concluded, after careful examination of the record, Rep. 231-264, that the Monument, "as it existed at the time of statehood, clearly included the submerged lands within its boundaries," Rep. 263-264. He considered both "whether Congress was on notice that the Executive reservation included submerged lands" and whether "the purpose of the reservation would have been compromised if the submerged lands had passed to the State." Rep. 230. He concluded that "the text of the documents creating and expanding the Monument and their interpretation by the executive branch supplied notice to Congress that the Glacier

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[19] The Act creating Glacier Bay National Park provides that "[l]ands, waters and interests therein withdrawn or reserved for the former Katmai and Glacier Bay National Monuments are hereby incorporated within and made a part of the Katmai National Park or Glacier Bay National Park." 16 U.S.C. 410hh-2.

Bay National Monument included the submerged lands within its boundaries." Rep. 232.[20]

The Master concluded that the boundaries of both the 1925 and 1939 Proclamations necessarily embrace submerged lands. The 1925 Proclamation states that the reservation contains "approximately 1,820 square miles," a figure that includes both uplands and submerged lands. Rep. 233; Exh. US-IV-9 p.3. The boundary of the 1925 Proclamation, like the boundary of the Coeur D'Alene Reservation in *Idaho*, 533 U.S. at 266-267, 274, crosses Glacier Bay rather than meandering along its shore, and it additionally bends from island to island. Rep. 233-235. As the Master correctly recognized, this Court held in *Alaska*, 521 U.S. at 38-39, that a boundary line drawn in a similar manner around islands off the Arctic Coast of Alaska demonstrated an intent to include submerged lands within the boundary. Rep. 234.

The Master additionally observed that the boundary of the 1939 Proclamation similarly runs along "the principal channel of Excursion Inlet," along "the center of Icy Passage, North Passage, North Indian Pass and Cross Sound to the Pacific Ocean," and then extends 3 nautical miles into the

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[20] The Master's conclusion that Congress had notice of the reservation of submerged lands went beyond what is strictly necessary under the first part of this Court's test. The Court has examined whether Congress had notice of a reservation of submerged lands where the President had arguably exceeded his authority to reserve such lands, in order to determine whether Congress had ratified the executive action. See *Alaska*, 521 U.S. at 44. That inquiry is unnecessary in the case of the Antiquities Act because that Act clearly authorizes the President to include submerged lands within national monuments. *United States* v. *California*, 436 U.S. 32, 36 (1978). See US-IV Memo. 29 n.15. The unique characteristics of the Antiquities Act are also relevant to the second part of this Court's test—whether Congress intended to retain the submerged lands at statehood. Congress intended that national monuments would be permanent; they can be abolished only by Act of Congress. US-IV Memo. 39-40. Congress was aware of that rule and rejected attempts to reduce the Glacier Bay Monument, which indicates that Congress intended to retain those lands at statehood. See *id.* at 40-45.

Pacific Ocean. Rep. 237-238.[21] Furthermore, President Eisenhower's 1955 Proclamation removed a portion of the Monument that the 1939 Proclamation had added. The 1955 Proclamation specifically stated that the eliminated area included "approximately 14,741 acres of land and 4,193 acres of water." 20 Fed. Reg. at 2103. See Rep. 240.

The Master also found notice to Congress from the 1958 atlas of withdrawals in Alaska that the Interior Department submitted to Congress during statehood proceedings. That atlas showed the boundary of the Monument enclosing submerged lands. Rep. 241; Exh. US-IV-45 p.3. This Court relied on that very same atlas in *Alaska*, 521 U.S. at 56, when it determined that the Arctic National Wildlife Range contained submerged lands. Rep. 242.[22]

The Master concluded that failure to include the submerged lands would undermine at least three purposes for

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[21] Those boundary descriptions cannot be explained by a desire to include certain islands and exclude others. The boundary line runs through Excursion Inlet even though that inlet contains no islands on its western shore. Rep. 238. The line would not need to run 3 miles off the Pacific coast for the purpose of allocating islands because no islands lie more than 2 miles from the coast. *Ibid.*

[22] Additionally, the United States demonstrated that National Park Service (NPS) officials who were responsible for preparing a report supporting the 1939 Proclamation and developing the expanded boundaries specifically stated that the 1925 Proclamation included the submerged lands and that the 1939 Proclamation would add submerged lands, calculating the specific acreage in each situation. See Exh. US-IV-9 pp.ii, 2, 3. One week after President Roosevelt issued the 1939 Proclamation, the Interior Department issued a press release noting the presence of whales, porpoises, and seals "in Glacier Bay and adjacent waters" and stating that the 1939 Proclamation extended the Monument "to the three-mile limit off the coast." Exh. US-IV-11. The United States also demonstrated that, since creation of the Monument, the NPS has consistently administered the Monument's submerged lands as part of the Monument. The NPS has regulated seal hunting and aircraft landings, included the submerged lands in management plans, conducted studies of wildlife and fish on or over the submerged lands, and built structures on submerged lands without seeking state tidelands leases. See US-IV Memo. 20-24.

which Glacier Bay National Monument was established. First, excluding submerged lands would impair the Monument's purpose of enabling scientific study of Glacier Bay's magnificent tidewater glaciers. Rep. 245-251.[23] Second, excluding submerged lands would impair study—and threaten the destruction—of "interglacial forests," which exist both above and below the tideline. Rep. 251-253.[24] Third, excluding submerged lands from the Monument would compromise the Monument's object of protecting Glacier Bay's rich and varied flora and fauna, which are an integral part of the Monument. Rep. 255-264.[25] The Master concluded that, to the extent those conclusions rest on determinations of fact, there is no disputed issue of material fact warranting a trial. Rep. 250-251, 255.[26]

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[23] The 1925 Proclamation identified, as a principal feature of Glacier Bay, "tidewater glaciers of first rank," which extend into the Bay. Rep. 245. Those glaciers, which rest on fjord bottoms but can advance or retreat more than a kilometer per year, have been subjects of scientific investigation for more than a century. Rep. 247-249. The Master recognized that Glacier Bay's "complete glacier system includes the mountain peaks as well as the ocean depths," and the Monument "would not be an effective area for the study of tidewater glaciers if the submerged lands were excluded." Rep. 247 (quoting Exh. US-IV-5 pp.6-7).

[24] The 1925 Proclamation specifically identified those forests, which are the "remnants of ancient trees that had been buried underneath ice for millenia," as subjects of scientific study. Rep. 251.

[25] Congress has decreed that a fundamental purpose of national monuments is the protection of the wildlife therein. 16 U.S.C. 1. The 1925 Proclamation identifies the study of the movements of flora and fauna as a purpose of the Monument, and the 1939 Proclamation expanded the Monument to extend those protections, especially with respect to the brown bear. The United States submitted expert evidence that brown bears make extensive use of marine submerged lands and have customarily been hunted from vessels. Exh. US-IV-6 pp.6-13. The expert confirmed that, to protect brown bears, it is necessary to "protect both the intertidal habitat and an adjacent zone of nearshore marine water." *Id.* at 19. Alaska submitted no contrary evidence. Rep. 255.

[26] The Master considered and rejected Alaska's contrary contention. He concluded that, despite substantial discovery and ample time for preparation, Alaska had not presented any affidavit, expert report, or other

The Master next analyzed whether "Congress recognize[d] the reservation in a way that demonstrates an intent to defeat state title." Rep. 264-276. He correctly recognized that the ASA and this Court's decision in *Alaska* spoke directly to that issue. Rep. 264-266. The Court stated:

> In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife."

Alaska, 521 U.S. at 57. See Rep. 266. The Master concluded, consistent with this Court's holding in *Alaska*, that "§ 6(e)'s proviso operates as an independent retention clause and does not merely except certain property from the transfer effected by § 6(e)'s main clause." Rep. 272.

Against this background, the Master determined that Section 6(e) retained Glacier Bay National Monument's submerged lands in federal ownership because the Monument had been set apart "for the protection of wildlife." Rep. 273-276. The Master observed that Congress has decreed in 16 U.S.C. 1 that a fundamental purpose of national monuments is the protection of the wildlife therein. Rep. 273-274. Furthermore, "the texts of the 1925 Proclamation and the 1939 Proclamation indicate that the Monument was created in part for the purpose of preserving wildlife." Rep. 274.

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evidence contradicting the United States' evidence. Rep. 249-250, 255. Moreover, at oral argument, the Master specifically asked what further evidence the State might present at trial. Rep. 250. Counsel for Alaska responded: "it is not that there are facts that the State needs to come forward with, but that there's been a failure of proof on the United States' part." *Ibid.* (Tr. 155 (Feb. 3, 2003)). The Master recognized that Rule 56(e), Fed. R. Civ. P., requires no defense if the movant fails to meet the burden of showing the absence of any genuine issue of fact, but he concluded that the United States had met its burden here. Rep. 250-251, 255.

The Master accordingly concluded that "the United States retained title to the submerged lands in the Glacier Bay National Monument through § 6(e) of the Alaska Statehood Act" and is entitled to summary judgment on Count IV of Alaska's amended complaint. Rep. 276.

B. The United States' Reply To Alaska's Exception

Alaska challenges the Master's recommendation that the United States is entitled to summary judgment.[27] Alaska does not dispute the controlling legal principles. The United States can retain title to submerged lands by reserving those submerged lands prior to statehood with the intent of preventing passage of title to the State. *Alaska*, 521 U.S. at 33-34. Whether the United States intended to reserve submerged lands, and whether Congress intended to prevent passage of title, are "ultimately a matter of federal intent." *Id.* at 36. In determining whether submerged lands have been "expressly retained" so that they do not pass to the State under the equal footing doctrine and the SLA, the Court asks "whether the United States clearly included submerged lands within [a reservation] and intended to defeat state title to such lands." *Id.* at 50.

The Court's decision in *Alaska* has identified two further points that are directly applicable here. First, a reservation order will be deemed to reserve submerged lands if the reservation description "necessarily embrace[s] certain submerged lands" or if the purpose of the reservation would be "undermined" if the submerged lands are excluded. *Alaska*, 521 U.S. at 39 (emphasis omitted). Second, Congress mani-

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[27] Alaska actually goes even further, requesting (Br. 21) this Court to enter summary judgment in its favor, even though Alaska did not file a written motion for summary judgment before the Master. Alaska made an oral request for such relief at the Master's hearing on the United States' motion for summary judgment. See Rep. 228-229. The Master did not address Alaska's oral request (Rep. 1, 294), which apparently reflects his view that the request did not constitute a proper motion for summary judgment.

fested its intent, at the time of Alaska's statehood, to retain federal ownership of certain categories of submerged lands that are critically important to federal activities, including lands reserved or otherwise set apart for the protection of wildlife. *Id.* at 41-43, 55-57. The Master correctly determined that Glacier Bay National Monument was set apart for the protection of wildlife and that Congress retained the submerged lands within the Monument at the time of Alaska's statehood.

1. The United States Reserved The Submerged Lands Within The Exterior Boundaries Of Glacier Bay National Monument. The Master concluded that "Glacier Bay National Monument, as it existed at the time of statehood, clearly included the submerged lands within its boundaries." Rep. 263-264. Alaska states in a footnote (Br. 10 n.4) that it disagrees with the Master's conclusion that the Executive reservations establishing the Monument included submerged land, but Alaska has neither identified that issue as one of its exceptions nor developed the argument in its brief. Alaska has wisely refrained from excepting from the Master's conclusion that both the boundary descriptions and the purposes of the Monument indicated a clear intent to include the submerged lands.[28]

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[28] Alaska contends in its footnote (Br. 10-11 n.4) that "the Monument's borders were drawn partly through water to denote islands and other uplands to be included, not to clearly include the submerged lands" and that the "failure to reserve the *entire* seabed would not have defeated the United States' asserted purpose for the reservation." The Master correctly rejected Alaska's first contention because the water boundaries of the Monument traverse water bodies where there are no islands to allocate between those in and outside the Monument. Rep. 237-238. The Master rejected the second contention because the Court has never second-guessed the extent of the submerged lands reserved by the United States once the Court has determined that exclusion of all submerged lands would undermine a purpose of a reservation. Rep. 252 (citing *Alaska*, 521 U.S. at 40-41); see US-IV Reply 10-11.

2. Congress Retained Title To Glacier Bay National Monument, Including Its Submerged Lands, At the Time Of Alaska's Statehood. As the Court explained in *Alaska*, the ASA set forth the general rule that the United States retained title to all property it owned before Alaska's admission to the Union, while Alaska acquired title to all property held by the Territory or its subdivisions. 521 U.S. at 55. Section 6(e) sets out one of several exceptions to that general rule. Section 6(e) provides that Alaska shall receive federal property "used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of [three specific statutes addressing fish and game management]." Rep. 265. Section 6(e) additionally contains a proviso that clearly expresses the intent of Congress that the United States shall retain lands set apart for the protection of wildlife. That proviso states that

> such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

Ibid. This Court categorically held in *Alaska* that Section 6(e)'s proviso "reflects a very clear intent to defeat state title" to submerged lands "so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'" 521 U.S. at 57.

Alaska seeks to escape this Court's controlling decision in *Alaska* by arguing that: (1) the Monument was not set apart for the protection of wildlife (AK Br. 19-21); (2) the Section 6(e) proviso applies only to lands that were both set apart for wildlife and administered by the Interior Department's Fish and Wildlife Service (FWS) (*id.* at 14-17); and (3) the Section 6(e) proviso is merely an exception to the main clause that

has no application in this case (*id.* at 12-13, 17-19). The Master correctly rejected each of those contentions.

a. The United States Set Apart Glacier Bay National Monument "For The Protection Of Wildlife." The Master concluded, for two reasons, that the Monument was "withdrawn or otherwise set apart as [a] refuge[] or reservation for the protection of wildlife." Rep. 273-276. First, since their inception, national parks and monuments have had, as a core purpose, the protection of wildlife. See US-IV Memo. 38. Congress codified that wildlife-protection purpose in the National Park Service Organic Act of 1916, which directs the NPS to administer all national "parks, *monuments*, and reservations" in accordance with

> the fundamental purpose of the said parks, *monuments* and reservations, which purpose is to conserve the scenery and the natural and historic objects and the *wild life therein* and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. 1 (emphasis added). The Master correctly rejected Alaska's argument that, because "some national parks do not have any wildlife," the language of 16 U.S.C. 1 cannot render all national monuments reservations for the protection of wildlife. Rep. 273-274. As he explained, Alaska's argument overlooks the word "therein" in the statute. While a monument with no significant wildlife may not have a wildlife purpose, Glacier Bay National Monument "undisputedly contains abundant wildlife within its boundaries, and therefore was set aside for the preservation of this wildlife." Rep. 274.

Second, the Master correctly recognized that the texts of the 1925 and 1939 Proclamations expressly state that the Monument was created in part for the protection of wildlife. Rep. 274. The 1925 Proclamation expressly identifies the study of flora and fauna as one of the purposes. The study of fauna necessarily requires its preservation. Rep. 254. The

1939 Proclamation indicates that the purposes of the expansion include the "proper care, management, and protection of the objects of scientific interest" within the Monument. Rep. 274. The 1925 Proclamation states that those objects of scientific interest include flora and fauna.

Furthermore, as Alaska specifically alleged in its original and amended complaints, a primary purpose of the 1939 expansion of the Monument was to "set aside a refuge for brown bears." Am. Compl. ¶ 57. Alaska has since purported to disavow that allegation, but it has never moved for leave to amend the complaint to repudiate the allegation. The Master has generously recommended that the Court not hold Alaska to the allegation in the complaint. Rep. 256.[29] He therefore examined the detailed evidence and considered the arguments of the parties. Rep. 256-264. The Master correctly concluded that the great weight of evidence supports the position of the United States—and the position of Alaska until the United States moved for summary judgment— that a primary purpose of expanding the Monument in 1939 was to create a refuge for brown bear. Rep. 263-264. See US-IV Memo. 15-19, 33-34; US-IV Reply 14-19.[30]

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[29] The United States suggests that the Court should not ignore a judicial admission, such as the allegations of a complaint, when the party who made the admission has neither moved for nor received leave to amend the complaint. See *Martinez* v. *Bally's La., Inc.*, 244 F.3d 474, 477 (5th Cir. 2001); *Solon* v. *Gary Cmty. Sch. Corp.*, 180 F.3d 844, 858 (7th Cir. 1999); *Missouri Hous. Dev. Comm'n* v. *Brice*, 919 F.2d 1306, 1314 (8th Cir. 1990); 2 J. Strong, *McCormick on Evidence* § 254, at 138, § 257, at 142 (5th ed. 1999). The usual rule requiring amendment is particularly appropriate in cases such as this one, in which the admission goes to a crucial element of the case and the party has had ample time and opportunity to seek leave to amend.

[30] That evidence shows that the Executive and Congress repeatedly discussed plans to expand the Monument to create a brown bear refuge. In 1931, the Special Senate Committee on Wildlife Conservation (Special Committee) recommended that the NPS study an expansion of the Monument "which would protect a certain number of large brown bears." Exh. US-IV-19 p.253. In 1932, the head of the Alaska Game Commission testif-

b. Congress Retained Title To Glacier Bay National Monument Without Regard To Whether The Wildlife Lands Therein Were Administered By The National Park Service Or The Fish And Wildlife Service. This Court has squarely ruled that Section 6(e) of the ASA demonstrates that "Congress clearly contemplated continued federal ownership of certain submerged lands—both inland submerged lands and submerged lands beneath the territorial sea—so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.'" *Alaska*, 521 U.S. at 57. Alaska seeks to avoid that holding by arguing (Br. 14-17), without textual support, that Section 6(e)'s proviso applies only to lands that the FWS administers. That argument is inconsistent with

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ied in support of a proposal to enlarge the Monument "as a bear sanctuary." Exh. US-IV-15 p.32. The Committee's chairman put on record that "this committee [has] made that specific recommendation that Mr. Terhune has just described." The chairman later wrote to the NPS director that he supported "an executive order to extend the confines of the Glacier Bay National Monument to include some of those coast forests and the further protection of the brown bear." Exh. US-IV-21. In 1937, the Administration reported to Congress on a ten-year program for Alaska, stating, in a section entitled "Refuges," that "wild animals and birds are especially protected by the [NPS] in * * * Glacier Bay National Monument." Exh. US-IV-19 p.147. The report, which provided an abbreviated description of the boundary of the proposed expansion running through water bodies, stated the proposed expansion had been urged since 1927 to "provid[e] a suitable wildlife refuge for the Alaska brown bear." *Id.* at 252-253. The report specifically stated that the "chief reasons" for expanding the Monument included "mak[ing] a suitable reserve for the brown bear." *Id.* at 260 n.73. In 1940, the Committee reported on the expansion using an acreage description that included submerged lands and stating that the expansion "gave much-needed protection to the giant brown bear and other subarctic species." Exh. US-IV-25 p.353. President Roosevelt himself took a personal interest in expanding the Monument to protect brown bears. When the President expressed shock that persons were shooting Alaskan brown bears from yachts, Secretary Ickes responded that the Interior Department planned to expand the Monument to protect the bears. Exh. US-IV-6 p.16. See Rep. 258-260.

Section 6(e), its history, and this Court's holding in *Alaska*. Rep. 274-276.

First, Section 6(e)'s text does not state that the United States retains only FWS-administered lands. If Congress had intended that result, it would have said so. Instead, Congress used the broad language proposed by Interior Secretary Chapman, who stated that *all* lands and waters set apart for wildlife protection would be retained regardless of the mechanism or statutory authority employed. See Exh. US-IV-40 p.49.[31]

Second, Alaska bases its argument on legislative history that does not support its contention. Alaska contends (Br. 15) that the Section 6(e) proviso reaches only FWS-administered lands because the 1954 Senate Report on the ASA states, in noting that "wildlife refuges" are specifically excepted from the grants to the State, that the FWS has "valuable installations" in Alaska (Exh. AK-451 p.31). That report does not say that the United States will retain only FWS-administered wildlife refuges. To the contrary, later committee reports refer more generally to the retention of "withdrawn land used in general wildlife and fisheries research activities" (1957 House Report, Exh. US-IV–62 p.19), or "wildlife refuges or reservations" (1957 Senate Report, Exh. US-IV-63 p.17). Neither the Executive nor Congress employs the term "wildlife refuges" exclusively to signify

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[31] Secretary Chapman stated, in explaining the language that became Section 6(e), that "the United States would retain administrative jurisdiction over the Pribilof Islands and over *all other Federal lands and waters* in Alaska which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws or *other Federal statutes of general application*." Exh. US-IV-40 p.49 (emphasis added). The Antiquities Act plainly qualifies as such a statute. See Rep. 253, 261; see also US-I Memo. 37-38; US-I Reply 20-21. Furthermore, both at the time of the 1939 expansion and at the time that Secretary Chapman suggested the language of Section 6(e), NPS regulations provided that the "Parks and Monuments are sanctuaries for wildlife of every sort." 36 C.F.R. 2.8 (1939); 36 C.F.R. 1.9 (1949).

FWS-administered lands.[32] Alaska's reliance (Br. 16-17) on the 1954 Senate Hearings (Exh. AK-452) is likewise misplaced. Alaska portrays the hearings as an explanation of the meaning of Section 6(e), but the hearings barely refer to the Section. The hearings, read as a whole, refute Alaska's contention that Congress sought to retain only FWS-administered refuges.[33]

Third, Alaska's argument is inconsistent with the Court's holding in *Alaska* that the submerged lands within the Arctic National Wildlife Refuge (ANWR) remained in federal ownership because they had been set apart for the pro-

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[32] See Exh. US-IV-19 pp.252-253 (expansion of Glacier Bay National Monument proposed to provide "a suitable wildlife refuge for the Alaska brown bear"); 16 U.S.C. 694 (fish and game refuges within National Forests remain under Forest Service jurisdiction). Both before and after Alaska's statehood, revenue distribution schemes recognized that agencies other than the FWS also administered wildlife refuges. See Refuge Revenue Sharing Act, 1935, ch. 261, § 401, 49 Stat. 383; Act of Aug. 30, 1964, Pub. L. No. 88-523, 78 Stat. 701; H.R. Rep. No. 88-1753, 14, 15-16 (1964) (explaining that receipts from wildlife refuges administered by agencies other than FWS would be distributed pursuant to other statutes). Moreover, the FWS's work and "valuable installations" in Alaska were likewise not limited to FWS-administered refuges, but extended to national monuments as well. See Exh. AK-452 p.32 (testimony of NPS director regarding FWS facility in Katmai National Monument).

[33] Alaska overlooks the most salient features of those hearings. The Senate Committee requested representatives of each land-managing agency to provide information on the lands each administered in Alaska and on whether any reservations could be eliminated or reduced in size. Exh. AK-452 pp.23-24. The FWS witnesses primarily discussed only those lands that the FWS administered, and they objected to the elimination of most FWS-administered reservations. *Id.* at 55-84. The NPS director testified on Glacier Bay National Monument, which he described as a "water park" and as a "series of glaciers on a mountain range, with the Glacier Bay going up though the center." *Id.* at 46. He specifically urged that all of the Monument should remain in federal ownership. *Id.* at 54. Significantly, the Committee considered it irrelevant which Interior Department subdivision administered particular lands for wildlife protection. As Senator Cordon stated, "We are not too much interested in which division of the Department of the Interior does the work. I know you folks might be, but we are not." *Id.* at 66.

tection of wildlife on the date of Alaska's statehood. See 521 U.S. at 46-61. On that date, the FWS did not administer the lands constituting ANWR. See *id.* at 46. Instead, those lands were under the jurisdiction of the Interior Department's Bureau of Land Management. See 43 C.F.R. 295.10(a) (1954).[34]

More fundamentally, Alaska's attempt to exclude national monuments from the lands "set apart as refuges or reservations for the protection of wildlife" would lead to starkly incongruous results. Congress retained federal ownership of lands that had been reserved or otherwise set apart for the protection of wildlife because it concluded that the United States should control those lands, and the wildlife therein, for the benefit of the entire nation. That fundamental policy applies regardless of which particular federal agency is administering a particular wildlife sanctuary. Indeed, Congress has mandated a higher level of wildlife protection in NPS-administered national parks and monuments than in FWS-administered refuges. See 16 U.S.C. 1 (NPS must "conserve" the wildlife "unimpaired for the enjoyment of future generations"); compare Exh. AK-452 pp.32, 48 (monuments closed to hunting and trapping) with *id.* at 65 (Kenai Moose Range open to hunting). Congress would have had no reason to relinquish those wildlife lands for which it had accorded the highest level of national protection.

c. Congress Retained Title To Glacier Bay National Monument Without Regard To Whether The Monument's "Sole Purpose" Was Wildlife Conservation Under Certain Federal Statutes. Alaska seeks to avoid, on yet another ground, this Court's unambiguous ruling that Section 6(e)

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[34] The FWS had applied for a refuge withdrawal, but that withdrawal was not made until after statehood. *Alaska*, 521 U.S. at 46. The regulations in effect at the time of application provided that an application for a withdrawal segregated the land, but that "[s]uch temporary segregation shall not affect the administrative jurisdiction over the segregated lands." 43 C.F.R. 295.10(a) (1954).

expresses Congress's intention to retain federal ownership of lands, including submerged lands, that were "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Alaska*, 521 U.S. at 57. Alaska observes (Br. 11-13) that the main clause of Section 6(e) grants Alaska "real and personal property used for the sole purpose of [wildlife] conservation" under three particular fish and game laws applicable to Alaska. Alaska then argues that Section 6(e)'s proviso, which retains in federal ownership lands set apart "as refuges and reservations for the protection of wildlife," retains only those lands encompassed within Section 6(e)'s main clause. The Master correctly rejected that construction. Rep. 267-272.

The Master recognized, as the appropriate starting point, that "[g]eneralizations about the role of a proviso in a statute cannot resolve th[is] dispute." Rep. 268. He noted that this Court has repeatedly held that, while provisos may "serve merely to create exceptions to general rules," they may also "state independent rules." *Ibid.*[35] The Master accordingly examined the Section 6(e) proviso in light of its context and this Court's decision in *Alaska*. He correctly concluded that Section 6(e)'s proviso does not serve merely to limit the scope of the narrow category of property that Section 6(e)'s main clause transfers to Alaska. Instead, the Section 6(e) proviso independently expresses Congress's intention to retain in federal ownership lands, such as Glacier Bay National Monument, that have been set apart "for the protection of wildlife." Rep. 269-272.

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[35] See *McDonald* v. *United States*, 279 U.S. 12, 20-22 (1929); *Springer* v. *Government of Philippine Islands*, 277 U.S. 189, 207-208 (1928); *United States* v. *G. Falk & Bros.*, 204 U.S. 143, 149 (1907); *United States* v. *Whitridge*, 197 U.S. 135, 143 (1905); *ICC* v. *Baird*, 194 U.S. 25, 37 (1904). See also 2A N. Singer, *Statutes and Statutory Construction* § 47.09, at 238 (6th ed. 2000); F. McCaffrey, *Statutory Construction* § 58, at 118-119 (1953); E. Crawford, *The Construction of Statutes* § 297, at 604-605 (1940); C. Jones, *Statute Law Making in the United States* 203 (1912).

As the Master explained, this Court *held* in *Alaska* that Section 6(e) is an independent retention clause. Rep. 272. Indeed, Alaska itself now concedes that "*this Court held that submerged lands within the [ANWR] were expressly retained under the proviso to Section 6(e).*" AK Br. 18 (emphasis added). Alaska contends, however, that this Court reached that result on the "assum[ption]" that "ANWR lands would have been covered by the main clause but for the proviso." *Ibid.* The United States has pointed out that ANWR does not fit within the express terms of the main transfer provision. See Rep. 269.[36] But as the Master recognized, that debate is of little moment. Rep. 270-271. The important point is that the Section 6(e) proviso *necessarily* functions as an independent retention provision that, by *its* terms, includes Glacier Bay National Monument. Rep. 272, 273.

The Master has explained precisely why this is so. Rep. 271-272. Alaska had argued in *Alaska*—as it argues here—that the Section 6(e) proviso merely creates an exception to Section 6(e)'s main clause. Accordingly, Alaska reasoned, even if the Section 6(e) proviso excluded ANWR from the Section 6(e) main clause, the Section 6(e) proviso would not prevent the submerged lands therein from being transferred to the State under Section 6(m), which makes the SLA applicable to Alaska. AK Reply Brief in *Alaska*, No. 84 Orig., at 44-45 (Oct. 1996). The Court rejected Alaska's argument, ruling that if ANWR had been set apart "for the protection

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[36] Alaska does not contend that Section 6(e)'s main clause actually encompasses ANWR, stating that it "is immaterial to this case whether [the Court's] assumption was correct." Br. 18 n.7. Alaska apparently recognizes that the lands that would constitute ANWR were not, at the time of statehood, "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska under [the specifically enumerated statutes]." ASA § 6(e). Furthermore, when ANWR was formally established, it was not created or managed pursuant to those statutes. See Pub. Land Order No. 2214, 25 Fed. Reg. 12,598 (1960).

of wildlife," then the Section 6(e) proviso would result in the retention of the upland and submerged lands—notwithstanding Section 6(m)—because the *proviso* expresses Congress's clear intent to retain submerged lands that were "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Alaska*, 521 U.S. at 56-57. See Rep. 271-272. The Court's decision necessarily "treated the proviso as an independent retention clause, not merely as a limitation on a transfer clause." Rep. 272.[37]

Alaska ultimately concedes that this Court's decision in *Alaska* "did treat the proviso as a retention clause." Br. 18. But Alaska retreats to the implausible position that the Section 6(e) proviso retains only some subset of the property encompassed by Section 6(e)'s main clause. Br. 18-19. Section 6(e)'s main clause transfers to Alaska a varied but narrow category of "real and personal property"—such as facilities, vehicles, and equipment—that federal government agencies had "specifically used for the *sole purpose* of conservation and protection of the fisheries and wildlife of Alaska, under [three specific wildlife and fisheries management statutes pertaining to Alaska]." ASA § 6(e) (emphasis

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[37] The Court's holding that the Section 6(e) proviso is an independent retention clause is consistent with Secretary Chapman's explanation of that provision. He stated that the United States would retain "all other Federal lands and waters in Alaska which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws or other Federal statutes of general application." Exh. US-IV-40 p.49. He noted that Section 6(e) was designed to "bring[] about a division of the fish and wildlife activities now conducted by the United States in Alaska, along lines of demarcation conforming to the recognized distinctions between Federal and State functions." *Ibid.* Under that division, the State would receive a varied assortment of "real and personal property" used solely for managing Alaska wildlife and fisheries under particular laws in accordance with typical state functions, while the United States would retain "lands withdrawn or otherwise set apart for the protection of wildlife [and] facilities utilized in connection therewith," ASA § 6(e), in accordance with the national interest in preserving wildlife reserves.

added). See note 37, *supra*. Under Alaska's construction, *the United States would retain* submerged lands that are part of any federal reservation that fits within Section 6(e)'s main clause—*viz.*, real property used solely for certain wildlife programs that *Alaska would undertake* upon statehood. But *the United States would relinquish* submerged lands within those federal reservations used for programs *the federal government would continue to administer*, such as fur seal and migratory bird protection or conservation and study of wildlife within national parks and monuments. Alaska's construction produces a counter-intuitive result that is not only illogical, but also accomplishes nothing. Section 6(e)'s main clause, by its terms, does not reach national parks, monuments, or wildlife refuges, which typically serve multiple purposes and are managed under a wide variety of federal laws that protect the interests of the Nation as a whole. Alaska cannot point to a single wildlife reserve that fits within the precisely drafted terms of Section 6(e)'s main clause. Thus, under Alaska's construction, the Section 6(e) proviso would apply to a null set.[38]

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[38] As noted, ANWR does not fall within Section 6(e)'s main clause. See note 36, *supra*. Of the 26 FWS-administered wildlife refuges in existence during Congress' deliberations on the ASA, Exh. AK-452 p.64, Alaska claims that two (the Kenai National Moose Range and Kodiak National Wildlife Refuge) qualify. The executive orders establishing those refuges, however, do not cite the specific statutes identified in Section 6(e)'s main clause. Both executive orders reference the Alaska Game Law of *1925* rather than the Alaska Game Law of *1943*. Exec. Order No. 8857 (Kodiak), 6 Fed. Reg. 4287 (1941); Exec. Order No. 8979 (Kenai), 6 Fed. Reg. 6471 (1941). Moreover, the FWS director testified in the Statehood Act hearings that those refuges were used for purposes beyond game protection. See Exh. AK-452 p.67 (recreation areas in Kenai reserve), p.74 (industrial use zones in Kodiak reserve); see also *Udall* v. *Tallman*, 380 U.S. 1 (1965) (oil and gas leasing on Kenai reserve). Even if those difficulties with Alaska's theory were overlooked, the result would be that the United States retained submerged lands within only those two refuges. But the FWS director recommended, and Congress understood, that all the other refuges would be retained in federal ownership under the ASA, Exh. 452 p.71, and some of those refuges undisputedly include

This Court's decision in *Alaska* embraces, instead, a far more sensible construction of Section 6(e). Section 6(e)'s main clause granted Alaska the real and personal property it needed to exercise traditional state wildlife and fisheries management functions. Section 6(e)'s proviso simultaneously recognized that the United States would retain in federal ownership those lands—including submerged lands—that were set apart "for the protection of wildlife." Congress provided that the "transfer" identified in the main clause excluded lands set aside "for the protection of wildlife," but *not* because Congress envisioned that those lands were a subset of the "real and personal property" that the main clause transferred. Rather, Congress sought to make abundantly clear that the "transfer" contemplated in the main clause would not interfere with what Congress recognized as the overarching principle—namely, that the federal government would retain lands set aside "for the protection of wildlife" and "facilities utilized in connection therewith." ASA § 6(e). This Court's decision in *Alaska* embraces that construction of Section 6(e). See 521 U.S. at 57.[39]

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vitally important submerged lands. See, *e.g.*, Exec. Order No. 5858 (June 17, 1932) (creating the Semidi Islands Wild Life Refuge, which included "reefs and all lands under water appurtenant" to the Semidi Islands).

[39] This Court's decisions make clear that the crucial question is whether the relevant statutory language, read as a whole in its historic context, expresses congressional intent to retain title. See *Idaho*, 533 U.S. at 273-281; *Alaska*, 521 U.S. at 41-46, 55-61. For example, the Court concluded in *Idaho* that Congress retained submerged lands within an Indian reservation because various pre-statehood congressional actions, viewed in historic context, demonstrated that intent. 533 U.S. at 276; see *id.* at 273-281. Similarly, the Court concluded in *Alaska* that Section 11(b) of the ASA retained submerged lands in the National Petroleum Reserve, even though that Section does not specifically discuss "United States' *title* to submerged lands," because the statutory language, read in context, expressed that intent. 521 U.S. at 41-42. Applying the same approach, the Court concluded that Section 6(e) similarly expressed Congress's overarching and "clearly contemplated" intent that the United States would retain submerged lands in "refuges or reservations for the protection of wildlife." *Id.* at 57.

The Court's sensible construction of Section 6(e) in *Alaska* produces a sensible result in this case. Congress granted Alaska title to the vast majority of the submerged lands beneath inland waters and the territorial sea in Southeast Alaska. That grant includes, without objection from the United States, the vast majority of the submerged lands within the Tongass National Forest. See Rep. 276-277. But Congress retained the submerged lands within Glacier Bay National Monument—now Glacier Bay National Park and Preserve—so that the unique natural treasures encompassed within that reserve can be comprehensively managed on an integrated basis for the perpetual benefit of the Nation.[40]

CONCLUSION

The State of Alaska's exceptions to the Report of the Special Master should be overruled.

Respectfully submitted.

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SEPTEMBER 2004

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[40] The record includes a video presentation, entitled *Beneath the Reflections*, that vividly portrays those treasures. Exh. US-IV-8 App. 6.

APPENDIX A

28 U.S.C. 2409a—Real Property Quiet Title Actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

* * * * *

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

APPENDIX B

Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (codified as amended at 43 U.S.C. 1301 *et seq.*):

43 U.S.C. 1301—Definitions

When used in this subchapter and subchapter II of this chapter—

* * * * *

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

43 U.S.C. 1312—Seaward Boundaries of States

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State

became a member of the Union, or if it has been heretofore approved by Congress.

* * * * *

43 U.S.C. 1313—Exceptions From Operation of Section 1311 of This Title

There is excepted from the operation of section 1311 of this title—

(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union, otherwise than by a general retention or cession of lands underlying the marginal sea);

* * * * *

APPENDIX C

Article 7 of the Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1609, 516 U.N.T.S. 205, T.I.A.S. No. 5639:

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area ~~of an~~ indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

APPENDIX D

Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (codified at 48 U.S.C. note prec. § 21):

* * * * *

Section 4—Compact With United States.

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property, (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation * * *.

Section 5—Title to Property.

The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Section 6—Selection of public lands, fish and wildlife, public schools, mineral permits, mineral grants, confirmation of grants, internal improvements, submerged lands.

* * * * *

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., sections 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., sections 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., sections 221- 228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. Sums of money that are available for apportionment or which the Secretary of the Interior shall have apportioned, as of the date the State of Alaska shall be deemed to be admitted into the Union, for wildlife restoration in the Territory of Alaska, pursuant to section 8 (a) of the Act of September 2, 1937, as amended (16

U.S.C., section 669g-1), and for fish restoration and management in the Territory of Alaska, pursuant to section 12 of the Act of August 9, 1950 (16 U.S.C., section 777k), shall continue to be available for the period, and under the terms and conditions in effect at the time, the apportionments are made. Commencing with the year during which Alaska is admitted into the Union, the Secretary of the Treasury, at the close of each fiscal year, shall pay to the State of Alaska 70 per centum of the net proceeds, as determined by the Secretary of the Interior, derived during such fiscal year from all sales of sealskins or sea otter skins made in accordance with the provisions of the Act of February 26, 1944 (58 Stat. 100; 16 U.S.C., sections 631a-631q), as supplemented and amended. In arriving at the net proceeds, there shall be deducted from the receipts from all sales all costs to the United States in carrying out the provisions of the Act of February 26, 1944, as supplemented and amended, including, but not limited to, the costs of handling and dressing the skins, the costs of making the sales, and all expenses incurred in the administration of the Pribilof Islands. Nothing in this Act shall be construed as affecting the rights of the United States under the provisions of the Act of February 26, 1944, as supplemented and amended, and the Act of June 28, 1937 (50 Stat. 325), as amended (16 U.S.C., section 772 et seq.).

* * * * *

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Supreme Court, U.S.
FILED
OCT 8 - 2004
OFFICE OF THE CLERK

(8)

No. 128, Original

IN THE
Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Exceptions to Report of Special Master on Motions for Summary Judgment

MOTION FOR LEAVE TO FILE SUR-REPLY AND SUR-REPLY BRIEF FOR PLAINTIFF STATE OF ALASKA

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IN THE

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Exceptions to Report of Special Master on Motions for Summary Judgment

MOTION OF PLAINTIFF STATE OF ALASKA FOR LEAVE TO FILE SUR-REPLY BRIEF

Pursuant to S. Ct. Rule 21, plaintiff State of Alaska respectfully moves for leave to file the accompanying Sur-Reply Brief. Although denominated a sur-reply, the brief is in the nature of an initial reply brief that responds, for the first time, to the arguments of the United States and its amicus curiae submitted in opposition to Alaska's exceptions to the Report of the Special Master. For the following reasons, there is good cause to allow the brief given the particular circumstances and importance of this original action.

BACKGROUND

The background to this case is set forth more fully in Alaska's Exceptions to the Report of the Special Master and the accompanying brief, which were filed on July 12, 2004. This is an original action between Alaska and the United States seeking to confirm Alaska's title to submerged lands underlying much of Southeast Alaska. As the Special Master

has noted, the case is "one of the largest quiet title actions ever litigated." Report at 2. The case is presently before the Court on Alaska's exceptions to the 294-page Report of the Special Master on motions for summary judgment. That Report recommends that the Court take dispositive action on every count of the Amended Complaint. As Alaska has noted without dispute, this Court must consider every issue in this original action *de novo* without any deference to the Master. *See* Alaska Br. 9.

Only Alaska filed exceptions to the Report, in a document that is essentially similar to a petitioner's merits brief in a case within the Court's appellate jurisdiction. Alaska filed exceptions to the Master's recommendations on every count not already conceded by the United States, and requests that the Court enter final judgment in its favor on the merits. The United States filed a 50-page responsive brief that is essentially similar to a respondent's merits brief in an appellate case, and requests that the Court enter final judgment in its favor on the merits. In addition, the United States was supported by a 30-page brief filed by an amicus curiae that participated in none of the proceedings before the Special Master.

Alaska's proposed responsive brief, submitted herewith, is therefore in the nature of a reply brief in an appellate case. It responds directly to the arguments of the United States and its amicus, and represents Alaska's first opportunity before this Court to respond to any arguments raised against the State. It also otherwise complies with the page limits and other filing requirements for merits reply briefs.

ARGUMENT

Although the Court's rules for original actions do not provide for the automatic filing of a responsive brief by a party raising exceptions, the Court has granted leave to file such briefs in the past. *See, e.g.*, *Kansas* v. *Colorado*, 124 S. Ct. 2433 (2004); *Kansas* v. *Colorado*, 531 U.S. 1122 (2001); *Texas* v. *New Mexico*, 485 U.S. 388, 388 (1988); *Arizona* v. *California*, 459 U.S. 811 (1982). And in a previous original

action between these same parties, the Court entered a stipulated order permitting the parties to file sur-reply briefs in support of their exceptions. *See United States* v. *Alaska*, 517 U.S. 1207 (1996).

For many reasons, it would likewise be appropriate to permit Alaska a responsive brief in this case: the important issues before the Court are most likely dispositive of the entire case one way or the other; the issues require the Court's *de novo* review and involve a large record; Alaska will otherwise have no opportunity to respond at all to the United States since the United States did not file exceptions of its own; Alaska's brief responds in part to new arguments made by an amicus that has never before appeared in this case; and the proposed brief is consistent with reply briefs filed by petitioners in cases within the Court's appellate jurisdiction.

1. Some issues that come before the Court on exceptions to Masters' reports in original actions are interlocutory matters that are relatively straightforward and that may not require further responsive briefing. By contrast, the issues now before the Court will most likely be dispositive on the merits of this entire case, which has been pending for nearly five years. The Master recommended granting judgment as a matter of law on every count not already conceded by the United States, and based on the parties' opening briefs it appears likely that this Court will rule one way or the other on each count as a matter of law. The issues are very important, as they relate to the asserted dominion of the State of Alaska over lands that are "an inseparable attribute" of its state sovereignty. *United States* v. *Louisiana*, 363 U.S. 1, 16 (1960). Many of the issues are also complex, as evidenced by the fact that the Master saw fit to issue a 294-page report.

In these circumstances, the Court's determination of this case would benefit greatly from consideration of Alaska's responses to the lengthy submissions of the United States and its amicus. As explained in the accompanying brief, Alaska believes that the United States, among other things, has

mischaracterized certain arguments made by Alaska in its opening brief, has advanced new arguments in opposition not addressed in Alaska's exceptions or the Master's report, and has made arguments inconsistent with the Report it seeks to defend. Moreover, even though the United States did not file formal exceptions—to which Alaska would have been entitled to respond as of right—the United States nevertheless asserts that the Master erred on a number of issues. *See, e.g.*, U.S. Br. 14 n.7 ("The United States disagrees with the Master's characterization * * *."); *id.* at 24 n.12 ("The United States believes that the Master erred * * *."); *id.* at 28 n.17 (United States "disagrees with [the Master's] methodology"); *id.* at 40 & n.29. Because the United States filed no exceptions, without a sur-reply Alaska would have no opportunity to respond to these claims of error.

Accordingly, considerations of simple fairness militate overwhelmingly in favor of permitting Alaska an opportunity to reply to the United States' arguments, as would any petitioner in an appellate case. The Court should not consider the United States' arguments in favor of depriving Alaska of part of her sovereignty without also considering the State's response to those arguments.

2. In some original actions, both parties file exceptions to reports of Special Masters, which ensures that each party will have at least some opportunity to respond to arguments raised by the other party. Here, however, only Alaska has filed formal exceptions; thus, if Alaska cannot file a further reply it will have no opportunity to correct what it considers to be numerous errors in the United States' brief. As noted, Alaska believes that many of the arguments presented by the United States go beyond what is set forth in the Master's report and in Alaska's exceptions, and some of those arguments even challenge recommendations of the Master. In addition, unlike some other proceedings on exceptions in original actions, where the Court may already be familiar with issues as a result of earlier proceedings, the present

proceedings represent the first—and probably only—opportunity for the Court to consider the important substantive issues in this case. Given that Alaska has had no opportunity before the full Court to respond to any arguments against it, given the importance of the case, and given the dispositive nature of the proceedings, Alaska believes it should be heard in response to those arguments.

3. In cases within the Court's appellate jurisdiction, the petitioner has the right to file a reply brief in response to the respondent's arguments. Alaska submits that there is even more reason to follow that procedure here. For unlike the typical appellate case that comes before the Court, in which the issues have been refined through two levels of judicial decisionmaking, the Court must consider the issues in this case *de novo*. In making his recommendations, the Special Master permitted the parties to file opening, responsive, and reply briefs on each motion for summary judgment—for a total of 18 briefs—and he considered all of those briefs in connection with more than 560 documentary exhibits. Alaska believes that the Court, exercising its plenary review, should employ a similar procedure to that used by the Special Master, in order to ensure that each party has an opportunity to respond fully to the points raised by the other. That is particularly true given the likelihood, based on prior practice, that the Court will hold oral argument in this case. A response from Alaska would assist the Court by allowing it to focus the oral argument on points not fully clarified by the briefs, rather than using scarce argument time to examine points best addressed in Alaska's sur-reply.

4. A responsive brief is further warranted in light of the participation, for the first time in this case, of an amicus curiae in support of the United States. In addition to the 50-page brief filed by the United States, amicus National Parks Conservation Association ("NCPA") has filed its own 30-page brief in opposition to Alaska's exceptions. NCPA has never before appeared at any stage of this case, either

before the Special Master or this Court. And it has now sought (improperly, in Alaska's view) to raise new arguments not addressed by the United States, by the Special Master, or in Alaska's exceptions. Indeed, virtually its entire brief consists of such arguments. *See* Amicus Br. 13-30. Under the Court's rules, amicus briefs on the merits are to be filed at the same time as the brief of the party being supported or, if the amicus supports neither party, at the same time as the petitioner's brief. *See* S. Ct. R. 37.3(a). The rule thus contemplates that the opposing party will always have an opportunity to respond to the arguments of the amicus. If the amicus supports the petitioner, the respondent can respond in its responsive brief. If, similar to this case, the amicus supports the respondent, the petitioner can respond in its reply brief. Good cause therefore exists to permit Alaska to file a sur-reply brief in this case, for otherwise Alaska will have no opportunity to respond to numerous new arguments raised for the first time by a party that has never before appeared at any stage of this litigation.

5. Finally, Alaska's responsive brief conforms with the page limit governing reply briefs in cases within the Court's appellate jurisdiction, and has been filed within the time period allowed for such reply briefs. Including this brief, Alaska will have filed briefs totaling seventy pages, the normal amount for a party challenging a decision before this Court, while the United States and its amicus have filed briefs totaling eighty pages. Accordingly, the United States cannot claim to have been prejudiced by the filing of the brief.

CONCLUSION

For the foregoing reasons, the Court should grant Alaska leave to file the accompanying sur-reply brief.

Respectfully submitted,

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SUR-REPLY BRIEF FOR STATE OF ALASKA

I. THE STATE HAS TITLE TO THE SUBMERGED LANDS UNDERLYING GLACIER BAY.

A. The Plain Language Of Section 6(e) Is Dispositive.

1. The United States does not dispute the standard for Count IV: the Court cannot infer Congress's intent to retain submerged lands—an inseparable attribute of state sovereignty—but instead will presume the opposite unless Congress *clearly* stated an intent to retain title at statehood. Yet the United States' argument does not embrace this standard in the least. It identifies only the proviso of Section 6(e) of the Statehood Act as the purported expression of Congress's intent to retain title, yet nothing in the statute's plain language remotely covers the submerged lands of Glacier Bay, much less provides the requisite *clear and unambiguous* expression of intent. And although Alaska highlighted this issue as the core of its title claim, the United States buries its response starting on page 44 of its brief. When it does finally address the point, it posits an untenable reading of Section 6(e).

Ignoring the plain statutory language, the United States argues generally that provisos do not always make exceptions. U.S. Br. 45. But there is no mystery about how the Section 6(e) proviso works: it expressly defines itself as an exception to a particular action, unlike the statutes in any of the cases the United States cites. By its terms, the proviso refers back to the main clause and retains for the United States a *subset* of the properties covered by the main clause: "Provided, that *such transfer shall not include* * * *." The United States has no explanation for this clear text; nowhere in its brief does it attempt to explain the key words "such transfer shall not include." Indeed, when it finally addresses the point on page 49, the United States *admits* that "Congress provided that the 'transfer' identified in the main clause *excluded* lands set aside 'for the protection of wildlife * * *.' " U.S. Br. 49 (emphasis added). It says, however, that Congress did not

mean that wildlife refuges would be an *exception* to the conveyance but rather was just making "abundantly clear" that such refuges were not to be conveyed to the state. *Id.*

But the statute does not say that. Indeed, the United States never explains why the proviso would retain lands not otherwise conveyed. And with good reason: under its irrational interpretation, the proviso's *sole purpose* is to retain submerged lands even though the text says nothing about such lands. This is evident from the interaction between Section 6(e) and the rest of the Statehood Act. The United States says that the proviso is wholly divorced from the main clause, such that *none* of the lands covered by the proviso would otherwise be transferred to the State under the main clause. *See* U.S. Br. 48. But under Section 5, the United States *already* retained title to all lands it owned before statehood, except as provided in Section 6. Section 6(m) expressly grants the State submerged lands, but does not affect uplands of any properties the United States retained under Section 5. Under the U.S. interpretation, then, since Congress already retained *upland* federal property under Section 5, the sole purpose of the Section 6(e) proviso is to retain submerged lands within the described federal reservations.

The interpretation is untenable. Excluding property from a conveyance if the property was not included in the first place makes no sense; such an interpretation would render the proviso pointless and should be rejected. *See, e.g., Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 113 (2001) (rejecting interpretation that would render exclusion superfluous). And *nothing* in the proviso's plain language suggests that it was meant only to retain submerged lands. It refers broadly to entire reservations, nowhere mentions submerged lands, and is in the middle of a large subsection of the Act that deals only with transferring jurisdiction from the Fish and Wildlife Service to the State. If Congress intended the proviso to retain submerged lands in Glacier Bay, it could hardly have accomplished that goal in a more obscure manner.

In fact, Congress intended no such thing. It unambiguously intended the proviso to retain wildlife refuges otherwise encompassed by the main clause—which indisputably does not include Glacier Bay—to prevent their transfer to the State under the main clause. Having no support in the statute—much less the unequivocal statement required to divest the State of its equal footing lands—the United States asks the Court to disregard the clear statement rule and legislate its preferred result. The Court should decline the invitation.

2. The United States argues that *no* wildlife refuges covered by the proviso would otherwise have fallen within Section 6(e)'s main clause. U.S. Br. 48. That is wrong.[1] Alaska has cited the Kodiak Wildlife Refuge and Kenai Moose Range—which together constituted about half the acreage of all FWS refuges in Alaska—as two properties otherwise covered by the main clause but excepted by the proviso. The United States responds, somewhat disingenuously, that these reservations would not fall within the main clause because they were created under the provisions of the Alaska Game Law of 1925, not the Alaska Game Law of 1943. *Id.* at 48 n.38. These are the *same law*, however—the general wildlife management law for Alaska. The 1943 law is simply an updated version of the 1925 law, revised after these two reservations were created in 1941. *See* Act of July 1, 1943, ch. 183, 57 Stat. 301 (restating and amending 1925 law). The 1925 law was also codified at 48 U.S.C. § 192 (1940), the precise code section identified in Section 6(e).[2]

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[1] The argument, however, is ultimately immaterial, because this case is about Glacier Bay and, whatever else the main clause may cover, the parties agree that it does not cover Glacier Bay

[2] The United States also wrongly asserts that the main clause excludes lands upon which public activities took place. U.S. Br. 48 n.38. The conveyance ensured a smooth transfer of fish and wildlife management to the new State government. It assured that the State would get only the property that *the United States government* had used solely for general local fish and wildlife

3. Having nothing to say about the text of Section 6(e), the United States resorts to knocking down a strawman argument of its own creation. It characterizes the State as having made a separate argument that the proviso applies only to lands both set apart for wildlife and administered by FWS. U.S. Br. 38-39. In reality, Alaska noted the different jurisdiction of FWS and NPS not as a separate argument, but merely as additional support showing that Congress intended the proviso as an exception to the main clause. *See* Alaska Br. 14-17. The United States does *not* dispute the central points of this analysis: that the main clause includes only FWS property, because FWS administered the cited laws, *see id.* at 15 n.6, and that the main clause does not cover Glacier Bay, an NPS property, *see* Report at 267.

4. The United States argues that the plain language of Section 6(e) is "counter-intuitive" and "illogical" because it did not retain submerged lands within a national monument. U.S. Br. 48. But there is nothing incongruous about how Congress treated NPS lands in Alaska. Submerged lands within national monuments and parks are overwhelmingly state owned. Forty-five states had entered the Union by the time of the 1906 Antiquities Act, and 48 had entered by the time of the 1916 national parks Organic Act and the 1953 Submerged Lands Act ("SLA"). Therefore, any federal monuments or parks in these states necessarily contain state-owned submerged lands that had passed to the states at their creation. For example, California owns vast amounts of submerged lands within the offshore California Coastal National Monument, which extends twelve miles from the shoreline for the entire length of the California coast. *See* 65 Fed. Reg. 2821 (2000). *See also United States* v. *California*, 436 U.S.

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management, with the United States retaining property that it would need, even in part, for its continued management of fish and wildlife that was migratory or governed by treaty. Limited *public* uses (such as recreation) were permitted in wildlife refuges, but such uses had no relevance to the *governmental* division of fish and wildlife management accomplished by Section 6(e).

32, 37 (1978) (SLA granted California all submerged lands within the Channel Islands National Monument).[3]

B. Legislative History Refutes The U.S. Interpretation.

Without disputing that legislative history cannot satisfy the clear statement rule, *see* Alaska Br. 14, the United States nevertheless relies on such sources. The material it cites, however, does not come close to satisfying its burden.

Virtually ignoring the statement in the Senate report that, under the proviso, wildlife refuges are "[s]pecifically excepted from the grant" in the main clause, S. Rep. No. 83-1028 at 31 (1954), the United States relies principally not on any congressional report or legislator's statement, but on comments of an agency official, Secretary Chapman. That would be an exceedingly slim reed in any case. *See, e.g.*, *Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986) ("[N]one of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements."). In this case, though, the comments are truly meaningless, for the United must point to a *clear* statement by *Congress* ratifying the purported reservation. That requirement cannot be satisfied through reliance on ambiguous snippets of correspondence from an Executive branch official that nowhere refer to Glacier Bay, much less its submerged lands.[4]

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[3] While Congress did not treat Alaska's national monuments differently than those in other states, it *did* give special status to Alaska's only national park at the time, Mount McKinley, granting exclusive federal jurisdiction in Section 11(a) of the Statehood Act.

[4] The United States also cites a Senator's comment at a hearing that "[w]e are not too much interested in which division of the Department of the Interior does the work." U.S. Br. 43 n.33 (citation omitted). This statement had nothing to do with the proviso or Glacier Bay. The Senator was making a different point, apparent from the larger context—that he thought a two-million acre reserve to maximize food for moose was excessive.

Regardless, Chapman stated only that an amendment to Section 6(e) would create "a division of the fish and wildlife activities now conducted by the United States in Alaska, along lines of demarcation conforming to the recognized distinctions between Federal and State functions." U.S. Br. 47 n.37 (citation omitted). He distinguished between the property the State would need for its new "fish and wildlife activities" and the property the United States would need for its continuing federal "fish and wildlife activities." The amendment accomplished this division by giving the State only property that could be used for local fish and wildlife management under the general management laws, whereas the pre-amendment provision would have given the state *all* FWS property in Alaska. *See* Ex. US-IV-40 at 7. Because some FWS wildlife refuges were created under one of the general management laws, the Alaska Game Law, Chapman proposed a proviso excepting them from the conveyance. Glacier Bay had nothing to do with this division of property.[5]

C. The Court Did Not Decide The Issue In *Alaska*.

The United States argues that the Court has already decided in *United States* v. *Alaska*, 521 U.S. 1 (1997), that the Section 6(e) proviso retains submerged lands in all reservations set aside for the protection of wildlife, regardless of whether they otherwise would fall within the main transfer clause. That is false. The Court in *Alaska* expressly assumed that the proviso was *not* independent of the main clause—a point the Master acknowledged but the United States never mentions.

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5 The United States argues that when Chapman mentioned lands set aside "pursuant to the fur seal and sea otter laws, the migratory bird laws or other statutes of general application," he must have been referring to the Antiquities Act even though he never cited it. U.S. Br. 42 n.31 (citation omitted). Given the statement's context—a discussion of retaining FWS jurisdiction—and given that the largest refuges were created under the Alaska Game Law rather than the more specific laws he cited, it is far more plausible that the laws "of general application" were the generally applicable local fish and wildlife management laws later cited in Section 6(e).

In *Alaska*, the State argued that because the wildlife refuges covered by the proviso were exempted from the main clause, the submerged lands were not retained by the United States but instead passed to the State under Section 6(m). The Court did not, as the United States claims, reject this argument by holding that the proviso is a retention clause independent of the section's main conveyance clause. Rather, the Court expressly assumed that the ANWR lands would otherwise pass to Alaska under the main clause and thus that the proviso is *not* independent of the main clause. *See Alaska*, 521 U.S. at 60-61 (unless ANWR lands were covered by the proviso "they would have passed to Alaska under the main clause of § 6(e)"). Thus, while the proviso is a retention clause, it expressly retains only a subset of the lands otherwise covered by the main clause. The United States ignores the express premise for the Court's holding in *Alaska*.[6]

D. Glacier Bay Is Not A Wildlife Refuge.

Solely in the alternative, Alaska has argued that Congress did not set Glacier Bay apart for the protection of wildlife within the meaning of the proviso. *See* Alaska Br. 19-21. When the United States finally gets around to responding on Count IV, it attempts to confuse the issue by responding first to this alternative argument. U.S. Br. 39-40. The Court need not even consider the argument, however, because the

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6 The United States questions whether the assumption was correct. *See* U.S. Br. 46 n.36. The parties agree, however, that that question is immaterial to this case. *See id.* at 46 (question "is of little moment"); Alaska Br. 18 n.7. This case is about Glacier Bay, and it is *undisputed* that Glacier Bay is *not* covered by the main clause. But although the Court in *Alaska* did not explain the basis for its assumption that ANWR fell within the main clause, the Court did hold that the proviso covered ANWR because it had been set apart for a possible future wildlife refuge. Thus, the Court apparently assumed that the possibility that the ANWR lands would be used for the purposes specified in the main clause was sufficient to deem them covered by that clause but for the proviso.

proviso clearly does not apply to lands, such as Glacier Bay, not otherwise encompassed by the main transfer clause.[7]

But the United States is incorrect as well. It contends that the Antiquities Act now permits monuments for the protection of wildlife even though some monuments have no wildlife. But the question here is whether Congress unambiguously intended *Glacier Bay* to be a reservation for the protection of wildlife, not whether the Executive could now in some other circumstances create monuments for that purpose. Neither the Glacier Bay reservation order nor the letter forwarding it to the President mentioned bear or any wildlife conservation as a purpose. Alaska Br. 21 & n.11. The clear statement rule is therefore not satisfied.[8]

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[7] The Court also need not consider whether the Executive reservation included submerged lands, another issue onto which the United States seeks to deflect attention. But the evidence does not show an *unambiguous* Executive intent to reserve submerged lands. Merely drawing boundaries through marine waters does not evidence a clear intent to include submerged lands. Federal agencies routinely created upland reservations in Alaska by drawing large boxes around areas that included water: the boundaries of the Tongass Forest were drawn that way, yet the Forest Service continually disclaimed authority over the marine areas for half a century. *See* Mem. in Supp. of AK Mot. for Summ. Judg. on Count III at 28-35. It is not clear that *title* to submerged lands was necessary to study pre-glacial stumps or flora and fauna that appear as glaciers recede, or the glaciers themselves. *See* Report at 245-255. And it is not clear that protecting wildlife was even a purpose of the Monument. *See* Report at 255-263; Alaska Br. 21 & n.12.

[8] The United States "suggests" that the issue is affected by an allegation in the complaint that bear preservation was a purpose of expanding the Monument. U.S. Br. 40 & n.29. The Master found that Alaska did not judicially admit that legal issue, Report at 256, the United States took no exceptions, and the question is thus not before the Court. In any event, a reservation's purpose is a *legal* question that cannot be resolved by allegations in the complaint. *See, e.g., Guidry* v. *Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 716 (10th Cir. 1993). And the fact that some people associated with the Monument's creation may have had bear preservation in mind cannot constitute the requisite clear statement of Congress.

E. The New Amicus Arguments Should Be Rejected.

1. The Court cannot consider the arguments of the amicus that the United States has never raised. The Court will not consider arguments of amici that were not raised by the parties in the proceedings below or in this Court. *See Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992); *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). The rule should apply with even more force here, since the Master expressly contemplated amicus participation below, *see* Feb. 12, 2001 Order, § 5, and Alaska's exceptions were based on the arguments raised and ruled on below.

2. But the arguments are also wrong. The amicus argues that the 1906 Antiquities Act and 1916 Organic Act suffice to defeat state title to submerged lands in the later-created Glacier Bay Monument, without any further action by Congress at statehood. But this Court requires a clear showing *both* that Congress intended to defeat state title to specific pre-statehood reservations of submerged lands, and that the Executive intended to reserve the lands. *See* Alaska Br. 10; U.S. Br. 31. *All* executive action must be authorized by Congress. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-214 (1976). Thus, if general authorizing statutes could defeat state title to unnamed lands in advance, the separate requirement of ratifying action by Congress would be meaningless.

The Court squarely rejected this argument in *United States* v. *California*, 436 U.S. 32, 37 (1978). There, the President had reserved submerged lands within a national monument in 1949, after the Court ruled in *United States* v. *California*, 332 U.S. 19 (1947), that the lands had not passed to California at statehood. Congress then enacted the SLA in 1953. The Court held that the SLA granted to California the submerged lands within the monument, even though the President had reserved them under the Antiquities Act. 436 U.S. at 37. As

the Court stated, "[a] reservation under the Antiquities Act * * * means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another," and "cannot operate to escalate the underlying claim of the United States to the land in question." *Id.* at 40-41. Thus, *California* holds that an Executive reservation of submerged lands under the Antiquities Act does *not* suffice to retain those lands for the United States.

For Alaska, Congress expressly incorporated the SLA in Section 6(m) of the Statehood Act. Accordingly, any expression of Congressional intent to retain submerged lands within a particular national monument in Alaska would have to have been in the Statehood Act. The United States identifies only Section 6(e) as providing the ratification, but that statute is patently insufficient as shown above.[9]

3. The amicus implies that states in general, and Alaska in particular, are not fit to own submerged lands within national monuments or parks. *See, e.g.*, Br. 23. This argument demeans all states, which have for centuries exercised responsible stewardship over navigable waters within their boundaries as "an inseparable attribute" of their sovereignty. *United States* v. *Louisiana*, 363 U.S. 1, 16 (1960). And this sovereignty, as noted, overwhelmingly includes submerged lands within parks and monuments, nearly all of which were created after their respective states. *See supra* at 4-5.[10]

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9 The amicus asserts that Congress had notice of a map showing the Monument boundaries. *See* Amicus Br. 18-19. But without some *action* by Congress showing a clear intent to defeat state title, such notice is immaterial. Indeed, the same map showed the boundaries of the Tongass National Forest as encompassing marine waters, but the United States has *conceded* that Congress did not express an intent to defeat state title to those lands. *See* U.S. Mem. in Response to Mot. for Summ. Judg. on Count III.

10 The amicus suggests that this case could impact the status of the Colorado River in the Grand Canyon because the Grand Canyon National Monument was created before Arizona statehood. Br. 15. But Section 6(e) of the *Alaska* Statehood Act has no bearing on the Colorado River. If title to lands underlying that river is ever disputed—and the amicus admits it is not—that issue would be governed by the navigability of the river at statehood and the reservations and legislation applicable to that specific area.

Moreover, the Federal government has substantial authority, under the Commerce Clause and other provisions, to regulate submerged lands it does not own. *See, e.g.*, 43 U.S.C. § 1314(a) (reserved federal rights under SLA); *United States* v. *Brown*, 552 F.2d 817, 821 (8th Cir. 1977) (Property Clause allowed Congress to prohibit hunting on state-owned waters within national park). Thus, there is no contention here that state title would prevent Congress from regulating interstate cruise ships, commercial fishing or endangered species in Glacier Bay. In fact, Congress has done all those things. *See, e.g.*, 16 U.S.C. § 1538(a)(1)(B) (Endangered Species Act applies regardless of land ownership); Pub. L. No. 105-277, § 123, 112 Stat. 2681-259 (1998) (phase-out of commercial fishing in Glacier Bay), Pub. L. No. 107-63, § 130, 115 Stat. 414, 442 (2001) (regulating cruise ship traffic in Glacier Bay). Under the Supremacy Clause, state authority yields to any valid exercise of federal power. That the state and federal governments would have concurrent jurisdiction over sovereign state lands is a fully anticipated part of our federal system, not the aberration the amicus suggests.

Finally, the statements that Alaska wants to drill for oil, build "floating lodges," or authorize "mariculture" in Glacier Bay (Br. 27-28) are pure nonsense. The State has absolutely no intention of doing any such things. And state laws and plans offer a means of preventing development, including mining or lodges, that is incompatible with the waters or adjacent lands. *See* Alaska Stat. § 38.05.185(a); Northern Southeast Area Plan at 22, 35 (2002) (www.dnr.state.ak.us/mlw/planning/areaplans/nseap). Alaska takes seriously its responsibility to preserve the natural environment of the navigable waters that are its sovereign birthright. The

contrary accusations of the amicus are not only without foundation but also demean our Nation's federal structure.

For all these reasons, the Court should grant judgment to Alaska on Count IV of the Amended Complaint.[11]

II. THE WATERS OF THE ARCHIPELAGO ARE HISTORIC INLAND WATERS.

The United States nowhere shows that it ever took the bizarre position, before statehood or even a decade after, that there were isolated enclaves of high seas within the Archipelago wholly surrounded by territorial waters. Nor does it refute Alaska's evidence to the contrary.

1. The United States wrongly asserts that Alaska "acknowledges" that the Master required it to "show that the United States *exercised* the power to exclude all foreign vessels from the area." U.S. Br. 6 (emphasis added). In fact, the Master opined that Alaska "correctly argues that the United States *does not actually have to exclude foreign vessels* from waters for those waters to constitute inland waters; instead, the United States *merely has to assert the right to exclude them*." Report at 128 (emphasis added). The United States routinely allows foreign vessels into its historic

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[11] The Master recognized Alaska's motion for summary judgment on Count IV, which Alaska has renewed in its exceptions. While noting that the Master made no formal recommendation on the motion, U.S. Br. 36 n.27, the United States provides no reason why this Court cannot now grant judgment to Alaska if the Court holds that Congress did not ratify the purported reservation. Neither party has identified disputed factual issues. It thus would serve no purpose for the Court to remand the case to the Master in these circumstances. Indeed, even if Alaska had not made a motion, judgment would still be proper. *See, e.g.*, *DeWitt Constr., Inc.* v. *Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1135 n.6 (2002); *Bird* v. *Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1152 (9th Cir. 2001); 10A Charles A. Wright, Arthur Miller & Mary K. Kane, *Federal Practice and Procedure* § 2720, at 345 (1998).

and other inland waters—for example, Chesapeake Bay—without relinquishing its claim to the waters.

2. The United States does not answer Alaska's contention (Br. 22-24) that the 1903 Arbitration necessarily put foreign nations on notice of the U.S. claim to the Archipelago given this Court's holdings in the *Alabama & Mississippi Boundary Case*, 470 U.S. 93, 106-109 (1985).[12] Indeed, the United States nowhere even *cites* that decision, much less acknowledges the Court's holding that Norway and Britain's reliance on the U.S. claim left "*no doubt* that foreign nations were aware that the United States had adopted this policy." *Id.* at 107 (emphasis added). Instead, the United States wrongly asserts that it "had made clear to Norway *in 1949* that the United States did *not* claim the Archipelago waters as inland." U.S. Br. 15 n.8 (emphasis in original). The cited 1949 letter, however, *nowhere mentions the Archipelago*. *See* Report at 84-85; Report of the Special Master at 78-79, *United States* v. *Alaska*, No. 84 Orig. (Mar. 1996). Thus, it is not surprising that both Norway and Britain continued to rely on the U.S. claim less than one year *after* that letter. *See* Ex. AK-82 at 162-163, 200, 219; Ex. AK-83 at 154-155.[13]

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[12] The United States "disagrees" with the Master's finding that the United States expressed a position on the status of the waters in the Alaska Boundary Arbitration. U.S. Br. 14 n.7. The United States took no exceptions, however, so its objection is waived. In any event, this Court has already held that the Arbitration statements represented the "publicly stated policy of the United States." *Alabama & Mississippi Boundary Case*, 470 U.S. at 106-107. Those statements were not merely hypothetical musings. Although the United States was arguing against Britain's use of international law principles to delineate the *physical* coastline then in dispute, it unequivocally stated that those principles established the *political* boundaries of the Archipelago. *See* Report at 56-57.

[13] Indeed, the letter references a U.S. proposal made at the 1930 Hague conference. In 1964, 15 years *after* the letter, the United

3. The United States wrongly contends that the *Marguerite*'s location is "unsettled." U.S. Br. 16. The *only* record evidence referencing an *actual* location puts the vessel squarely in one of the "pockets" the United States now says were high seas at the time. The Coast Guard's initial reference to a non-existent location was simply a mistake that later was definitively rectified. The reference does not create a dispute of fact, since there cannot be any contention that the ship was at a place that did not exist. Moreover, the letter attaching the map showing the location of the interception expressly stated that the ship had been "fishing in American waters," Alaska Br., App. 9a, thus confirming that the United States claimed the identified location as American waters.[14]

4. The United States does not refute Alaska's contention that *discriminatory* enforcement of fishing regulations shows a claim to the waters at issue. It quotes the Court's comment that fisheries jurisdiction "frequently differs in geographic extent from the boundaries claimed as inland or even territorial waters." *United States* v. *Alaska*, 422 U.S. 184, 198-199 (1975). But the comment was made in the Court's discussion of *nondiscriminatory* enforcement for conservation purposes, not discriminatory enforcement against foreign nationals in areas open to U.S. fishing. As the Court stated, the latter action "manifests an assertion of sovereignty to exclude foreign vessels altogether" and "must be viewed * * * as an exercise of authority over the waters in question as inland waters." *Id.* at 201, 202. At statehood, international law barred discriminatory fisheries enforcement against foreigners outside the territorial sea. *See* Convention on Fishing and Conservation of the Living Resources of the High Seas, *opened for signature*

States told this Court that the waters of the Archipelago would be *inland waters under that very proposal*. *See* Alaska Br. 24 & n.14.

[14] October 1925, the date of the map, is in a contemporary time period with the July 1924 seizure. But that point is immaterial. For the map, apparently prepared on information from the ship's captain, *see id.*, is *undisputed* evidence of the ship's location.

Apr. 29, 1958, art. 7.2(c), 17 U.S.T. 138, 142, T.I.A.S. 5969 (1966) (permitting extra-territorial enforcement only if "such measures do not discriminate in form or in fact against foreign fishermen") (treaty cited in *Alaska*, 422 U.S. at 199).[15]

The United States disingenuously asserts that the United Nations report cited as further support for this rule, *see* Alaska Br. 29, "merely indicates that a nation's continuous assertion of exclusive fishing rights might give rise to an historic fisheries claim, not a historic waters claim." U.S. Br. 18 n.11. The quoted passage, however, states quite explicitly that a nation's claim to waters based on exclusive fishing rights "would be a claim to the area *as its 'historic waters.'*" Ex. US-I-4 at 13-14 (emphasis added).

5. The United States asserts that the evidence of a Russian blockade of the Archipelago is simply Alaska's "speculation." U.S. Br. 11. But it was the United States' *own expert* who described the *Chichagoff*'s actions as "a Russian blockade" and noted that it had "forbidden" a vessel from traveling to Sitka "by way of the interior channels." Alaska Br. 30 (citations omitted). Given the "relatively relaxed interpretation of the evidence" that governs this inquiry, *Alabama & Mississippi Boundary Case*, 470 U.S. at 114—a standard the United States does not dispute—this testimony, along with

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[15] The current Exclusive Economic Zone ("EEZ"), which extends 200 miles offshore, has no relevance here. *Cf.* U.S. Br. 16 n.9. Fishing regulation in the EEZ dates only from *1976*, long after Alaska's title vested. *See* Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (1976). As noted, at statehood international law barred discriminatory extraterritorial fisheries enforcement. Thus, the *Marguerite* seizure and the regulations applied to foreign vessels in the Archipelago until 1971 were based on the 1906 Alien Fishing Act, which expressly covered only Alaskan territorial waters. *See* Alaska Br. 25-26. It was not until 1982 that international law endorsed the EEZ. *See* U.N. Convention on the Law of the Sea, Dec. 10, 1982, arts. 55-63, 21 I.L.M. 1245, 1280-82 (1982).

Alaska's other evidence, provides ample basis for concluding that the 1903 U.S. claim continued prior Russian practice.[16]

6. In any event, the United States wrongly asserts that a historic inland waters claim must be asserted continuously for a century. U.S. Br. 20. It does not dispute Alaska's showing that another historic bay was recognized after a much shorter time period than the 68 years between the 1903 Arbitration and the 1971 disclaimer (or even the 56 years between 1903 and statehood). *See* Alaska Br. 31 & n.19.[17]

7. The United States offers no support for its *ipse dixit* that recognizing these historic waters would "create a significant adverse international precedent restricting the freedom of the seas." U.S. Br. 21. In fact, that pronouncement is directly contrary to the considered position the United States took long ago. *See* Alaska Br. 36; Ex. AK-122 at 1.

III. THE WATERS COMPRISE JURIDICAL BAYS.

A. Assimilation Is Required Under *Maine*.

1. Rocky Pass. In opposing assimilation of Kuiu and Kupreanof islands, the United States states only that a " 'mere glance at a map of the region' reveals that the Master's position comports with reality and common sense." Br. 25 (quoting *United States* v. *Maine*, 469 U.S. 504, 514

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[16] The United States notes that the 1886 internal correspondence of Secretary Bayard was published 20 years later, in 1906. U.S. Br. 13. That publication, however, was *after* the United States had expressly claimed the Archipelago's waters as inland in 1903.

[17] The United States incorrectly describes the waters of the Archipelago as "an international route of travel." U.S. Br. 20. *See also id.* at 27. The Master's report (at 104-107) reveals that most foreign vessels—carrying explorers, fur traders, prospectors traveling to the Klondike through Skagway, and tourists—did *not* use the Archipelago as an international route of travel. Instead, they entered the Archipelago to visit it, much like the foreign vessels entering Mississippi Sound to reach Gulf ports. *Cf. Alabama & Mississippi Boundary Case*, 470 U.S. at 103.

(1985)). But while the United States quotes *Maine* for that proposition, that decision in fact compels the contrary result.

In holding that Long Island must be assimilated, the Court in *Maine* did *not* evaluate "the entire area across which the two land-forms of interest face one another"—the United States' proposed test here. U.S. Br. 25 (citation omitted). Rather, the Court evaluated only a select portion of those waters: the East River. The United States does not dispute that if the Court had used the United States' newly proposed test in *Maine*, Long Island would likely have failed that test. *See* Alaska Br. 43-44. Nor does it dispute that Rocky Pass is the area here that is analogous to the East River, or that it presents a *stronger* case for assimilation than was presented in *Maine*. *Id.* at 43. Under *Maine*, these undisputed points compel rejection of the United States' new position here.

The United States parrots the Master's view that the Court must employ a new, inflexible mathematical test here because any other approach "would inevitably generate controversies." U.S. Br. 25 n.13. But the Court did not employ such a test in *Maine*. And as even the United States recognizes, *Maine* sets forth a subjective, multi-factor test for assimilation. *Id.* at 24. The United States has identified no irreconcilable controversies engendered by the Court's common-sense approach in the nearly 20 years since *Maine*. As with any multi-factor test. there will be some cases that are more difficult to decide than others. But the United States has identified no reason for overruling the *Maine* approach in favor of its new, inflexible alternative.

2. Wrangell Narrows. The United States' *sole* objection to assimilation of Kupreanof and Mitkof islands is that Wrangell Narrows allegedly has too much navigational utility. *See* U.S. Br. 25-26. Again, the United States disregards the controlling decision in *Maine*. Because the East River has always been far more heavily trafficked than Wrangell Narrows—a fact the United States does not dispute—this factor cannot bar assimilation here. *See* Alaska Br. 40-41.

3. Dry Island. Alaska has not "forfeited" its argument that Dry Island is a part of the mainland. U.S. Br. 27. To the contrary, Alaska has expressly raised that argument. *See* Alaska Br. 44-45. The Master did not reach the issue, Report at 193, but the Court can and should find assimilation. As both the Master and the United States have acknowledged, the Court in *Maine* assimilated Manhattan based on its obvious connection to the mainland. *See id.* at 191 n.51; Tr. at 70 (Feb. 4, 2003) (statement of U.S. counsel that "the Harlem River * * * is another example of something that's so clear that one doesn't even ask the question. Manhattan through the Harlem River is part of the mainland."). The United States advances no reason why Dry Island, similarly separated by an actual river, should be treated any differently.[18]

B. The Claimed Bays Are Well-Marked Indentations.

In response to the argument that the claimed bays are well-marked indentations under Article 7, the United States argues only that "Alaska plainly demands too much of the mariner." U.S. Br. 29. That is no answer. This question has always been resolved by looking at a map of the claimed bay *without* reference to non-assimilated islands. *See* Alaska Br. 46 & n.29. The *actual* standard of Article 7 asks whether an area is a "well-marked indentation" rather than "a mere curvature of the coast." The United States nowhere counters Alaska's submission that North and South Bays are far too pronounced indentations to be mere curvatures of the coast. Instead, it relies on a term—"geographical obviousness"—that is in the Master's report but *not* in Article 7. *See* U.S. Br. 28.

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[18] The United States claims the Master "erred" by overlooking a NOAA chart of Dry Strait, U.S. Br. 24 n.12, but the Court should not consider that argument because the United States took no exceptions. In any event, the Master was aware of the chart's flaws. As Alaska noted, that chart was based on a *pre-1900* partial bottom survey. *See* Alaska Opp. to Mot. for Summ. Judg. on Count II at 31 n.16. The Master correctly found that the "clearest evidence" shows that Dry Strait is "all or mostly dry at low tide." Report at 186. *See, e.g., id.* App. H (Ex. AK-334), Exs. AK-335 to AK-341.

But to the extent the mariner's perspective matters, it plainly supports bay status here, given the river-like nature of the Archipelago's sheltered waters. In fact, mariners throughout history have had no difficulty discerning the waters' inland nature. *See* Alaska Br. 2. There is no requirement that government bureaucrats recognize a bay, or that explorers name it as such. As the United States' *own* counsel has written elsewhere, "nomenclature does not determine the status of any feature under the Convention. A bay, island, or other geographic feature will be tested against the Convention's criteria as applied by the Supreme Court, regardless of what it has been commonly called." Michael W. Reed, 3 *Shore and Sea Boundaries* 288 n.286 (2000).[19]

C. The Principles Of Article 7 Support Bay Status.

The United States argues that Alaska's juridical bay claims are inconsistent with national interests or foreign policy, U.S. Br. at 29-30, but fails to mention that the Master *rejected* such arguments below. *See* Report at 172-174, 176. Because the United States took no exceptions, these arguments are not before the Court. But in any event, the Master was correct.

The United States argues that because it could, in its discretion, apply "straight baselines" here under Article 4 of the Convention, the areas cannot be juridical bays. But as the Master noted, if an area meets the standards of Article 7, then bay status follows automatically regardless of whether

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[19] The United States does not respond to our argument on the sufficiency of South Bay's penetration. It disputes the Master's method for measuring North Bay's penetration, U.S. Br. 28 n.17, but that argument cannot be considered because the United States took no exceptions. In any event, the Master was correct. *See* Report at 207-210. Penetration is properly measured to the deepest point in the area of the bay used for the semi-circle test, even if the end-point area could be separately closed off. *See* Alaska Count II Summ. Judg. Reply at 24 n.9; Reed, *supra*, at 232 n.142. As part of North Bay under the semi-circle test, Lynn Canal's shores are an appropriate end-point for the line of penetration.

Article 4 could also be employed. *Id.* at 173-174. While the United States may decline to draw straight baselines, it may not refuse to recognize a qualifying juridical bay. *See also* Convention art. 7(6) (Article 7 does not apply "where the straight baseline system provided for in Article 4 *is applied*") (emphasis added). This Court has held that an area can qualify as historic waters even if the United States has not chosen to employ Article 4 straight baselines. *See United States* v. *Louisiana*, 394 U.S. 11, 77 n.104 (1969). Article 7 juridical bays should be treated no differently. *See also* Alaska Opp. to Mot. for Summ. Judg. on Count II at 9-14.

The Master also correctly rejected the United States' assertion that recognizing the claimed bays is contrary to foreign policy interests, noting "that the Court took sovereign interests into account when it established the criteria for assimilation" in *Maine*. Report at 176. As the Court has held, the Convention itself strikes the proper balance between domestic and international concerns. *United States* v. *California*, 381 U.S. 139, 165 (1965). Having met the terms of Article 7, the claimed bays should be recognized.

CONCLUSION

The Court should grant Alaska summary judgment on Counts I, II, and IV of the Amended Complaint, and confirm the United States' disclaimer of title on Count III.

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No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY OF THE UNITED STATES IN OPPOSITION TO THE MOTION OF THE STATE OF ALASKA FOR LEAVE TO FILE A SUR-REPLY BRIEF

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In the Supreme Court of the United States

No. 128, ORIGINAL

STATE OF ALASKA, PLAINTIFF

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ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

REPLY OF THE UNITED STATES IN OPPOSITION TO THE MOTION OF THE STATE OF ALASKA FOR LEAVE TO FILE A SUR-REPLY BRIEF

ARGUMENT

When this Court receives a report of a special master in an original action, it typically invites the parties to file exceptions. See, *e.g.*, *Alaska* v. *United States*, 124 S. Ct. 2093 (2004). The Rules of this Court govern the form and length of the parties' briefs. See Sup. Ct. R. 33.1(g). Those Rules provide that the party filing exceptions may submit a 50-page brief in support of its exceptions, Sup. Ct. R. 33.1(g)(vi), while a party opposing the exceptions may submit a 50-page reply, Sup. Ct. R. 33.1(g)(viii) and (ix). Alaska, which has filed three exceptions to the Special Master's report in this case, has now moved for leave to file a "sur-reply brief" in response to the United States' reply brief. The United States opposes Alaska's motion because: (1) Alaska's proposal is inconsistent with the Court's Rules and customary practice in original cases; (2) Alaska has not provided an adequate justification for departing from this Court's normal briefing practice; and (3) granting Alaska's motion would not promote the fair and efficient presentation of the issues in this case.

1. This Court's Rules And Its Customary Practice In Original Actions Do Not Provide For A Sur-Reply

The Rules of this Court make no provision for a party to file a sur-reply brief in any circumstance, and this Court does not, as a matter of customary practice, allow such a brief in original actions. For at least 70 years, in dozens of original actions involving a wide range of issues, this Court has followed the practice of reviewing a special master's report by allowing "exceptions" with supporting briefs and "reply briefs" in response to the exceptions. *E.g.*, *United States* v. *Oregon*, 293 U.S. 524 (1934).[1] The Court formalized that practice in its July 26, 1995, amendments to Rule 33.1(g) of the Rules of this Court. See 28 U.S.C. App. at 510-511 (Supp. I 1995). The Court's decision to revise its Rules to formalize its practice expresses a judgment that the long-standing procedure ordinarily provides the Court with appropriate briefing when a party raises a challenge to a special master's recommendations.[2]

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[1] See, *e.g.*, *Alaska* v. *United States*, 124 S. Ct. 2093 (2004); *Kansas* v. *Colorado*, 124 S. Ct. 951 (2003); *Arizona* v. *California*, 528 U.S. 803 (1999); *Nebraska* v. *Wyoming*, 513 U.S. 923 (1994); *Virginia* v. *Maryland*, 537 U.S. 1102 (2003); *Oklahoma* v. *New Mexico*, 498 U.S. 956 (1990); *South Carolina* v. *Baker*, 479 U.S. 1078 (1987); *Texas* v. *New Mexico*, 465 U.S. 1063 (1984); *Tennessee* v. *Arkansas*, 451 U.S. 968 (1981); *United States* v. *California*, 444 U.S. 816 (1979); *Utah* v. *United States*, 425 U.S. 948 (1976); *United States* v. *Louisiana*, 411 U.S. 814 (1974); *Arkansas* v. *Tennessee*, 396 U.S. 873 (1969); *Louisiana* v. *Mississippi*, 381 U.S. 947 (1965); *Texas* v. *New Jersey*, 375 U.S. 928 (1963); *United States* v. *California*, 341 U.S. 946 (1951); *Arkansas* v. *Tennessee*, 308 U.S. 511 (1939).

[2] The United States has not discovered any instance in which the Court, on its own initiative, has directed a party to file a sur-reply in the course of briefing exceptions to a special master's report. The United States has discovered one instance in which the Court directed a party to filed a reply to a response opposing leave to file a bill of complaint. *Illinois* v. *Missouri*, 380 U.S. 901 (1965). The Rules of this Court currently allow a party to file a reply in response to a brief opposing a motion for leave to file a complaint. See Sup. Ct. R. 17.5.

In the vast majority of original actions, including important disputes that have prompted participation by amici curiae, the parties do not seek leave to file sur-reply briefs. See, *e.g.*, *Virginia* v. *Maryland*, 540 U.S. 56 (2003).[3] Nevertheless, in a few instances, a party has requested and received leave to file a sur-reply or its equivalent. See AK Mot. 2. In four of the five instances that Alaska cites, however, no party objected to the filing of the sur-reply.[4] In the fifth instance, a prior original action involving the United States and Alaska, the parties *jointly requested*, at the time the special master filed his report, that the Court enter a stipulated briefing schedule allowing each party to file a sur-reply. See *United States* v. *Alaska*, 517 U.S. 1207 (1996); Letter from Solicitor General Days to Francis J. Lorson, Deputy Clerk (May 14, 1996). Alaska has not cited, and the United States has not uncovered, any case in which the Court has allowed the filing of a sur-reply on exceptions over the objections of a party. During the same period, in other important and complex original actions, the Court has denied

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[3] In *Virginia* v. *Maryland*, No. 129, Original, the Court's docket entries show that Virginia filed a motion on July 22, 2003, requesting the Court to take judicial notice of certain matters, and that the Court denied that motion on October 6, 2003. See 124 S. Ct. 371 (2003).

[4] In *Kansas* v. *Colorado*, 124 S. Ct. 2433 (2004) (No. 105, Original), the United States did not object to Kansas's filing of a sur-reply limited to addressing the United States' arguments respecting Kansas's exceptions, where the United States, although a party to that action, did not participate in the proceedings before the Special Master but filed a brief opposing two of Kansas's exceptions. See KS Mot. for Leave to File Sur-Reply 1 (Apr. 23, 2004). In *Kansas* v. *Colorado*, 531 U.S. 1122 (2001) (No. 105, Original), the United States likewise did not object to Colorado's filing of a sur-reply in response to the United States' arguments in similar circumstances. This Court's docket entries in *Texas* v. *New Mexico*, 485 U.S. 388 (1988) (No. 65, Original), do not record any opposition to New Mexico's March 11, 1988, motion for leave to file a reply to Texas's reply, and the Court's docket entries in *Arizona* v. *California*, 459 U.S. 811 (1982) (No. 8, Original), do not record any opposition to Arizona's August 10, 1982, motion for leave to file a brief in response to the reply brief of the United States.

unilateral motions for leave to file a sur-reply brief in response to a reply to exceptions. See *New Jersey* v. *New York*, 521 U.S. 1149 (1997) (Ellis Island); *Nebraska* v. *Wyoming*, 506 U.S. 938 (1992) (enforcement of the Platte River Decree). The Court's decisions demonstrate that in reviewing exceptions, as in other contexts, the Court disfavors sur-replies and allows them only when there is a strong justification.[5]

2. Alaska Has Not Provided A Persuasive Justification For This Court To Depart From Its Normal Briefing Practice

Alaska provides five arguments in support of its motion for leave to file a sur-reply. Those justifications, whether viewed individually or in combination, are unpersuasive.

a. Alaska first contends (AK Mot. 3) that the Court should allow a reply brief because this case presents "very important" and "complex" questions that will dispositively resolve sovereign issues. But those features are common to most original actions, including cases in which neither party seeks to file a sur-reply, *e.g.*, *Virginia* v. *Maryland*, *supra*, and cases in which the Court has denied motions for leave to file a reply brief, *e.g.*, *New Jersey* v. *New York*, *supra*.[6]

b. Alaska next contends (AK Mot. 4) that it should be granted leave to file a sur-reply because the United States did not file exceptions to the Special Master's report and

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[5] The Court summarily denies motions for leave to file a sur-reply in other contexts. See *Stewart* v. *Dutra Constr. Co.*, No. 03-814, 2004 WL 2157976 (Sept. 28, 2004) (certiorari jurisdiction); *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 528 U.S. 984 (1999) (certiorari jurisdiction); *Kansas* v. *Nebraska*, 525 U.S. 1101 (1999) (motion for leave to file complaint); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 510 U.S. 961 (1993) (certiorari jurisdiction); *New Jersey* v. *New York*, 510 U.S. 805 (1993) (motion for leave to file complaint).

[6] Alaska also asserts that, as a matter of "simple fairness," it should have an opportunity to respond to the United States' reply. AK Mot. 4. The United States addresses that assertion in the third point of its submission, at pp. 6-9 *supra*.

therefore Alaska will not have an opportunity for "further reply." But even if the United States had filed exceptions, Alaska's reply would have been limited to responding to *those exceptions*. The absence of exceptions by the United States has no bearing on Alaska's request for leave to file a sur-reply respecting Alaska's *own* exceptions. See *Virginia* v. *Maryland*, *supra* (Maryland alone filed exceptions and did not request leave to file a sur-reply).[7]

c. Alaska contends (AK Mot. 5) that it should be granted leave to file a sur-reply because the sur-reply serves the same function as a reply brief within the Court's certiorari jurisdiction, allowing a petitioner to "respon[d] to the respondent's arguments." The Court, however, has adopted a different approach to briefing exceptions in original actions, which limits the parties to one brief apiece and requires the parties to focus their arguments on excepting to or defending the master's report. As Alaska notes, the Master's extensive report in this case provides recommendations drawn from 18 briefs and more than 560 exhibits. *Ibid.* The Court's Rules and customary practice properly direct the parties to focus their attention squarely on why they believe the Master's recommendations are right or wrong. Alaska has not suggested that the Court's Rules and customary practice should be changed.

d. Alaska contends (AK Mot. 5-6) that it should be granted leave to file a sur-reply to address the amicus curiae brief of the National Parks Conservation Association

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[7] Alaska observes that, while the United States did not file exceptions, it noted in three footnotes its disagreement with some of the Master's statements on nondispositive matters. See U.S. Reply Br. 14 n.7, 24 n.12, 28 n.17. The United States did not file exceptions because it fully supports the Master's ultimate recommendations. As the United States made clear, the statements that the United States questioned involve matters that the Court need not reach and that, in any event, would not affect the outcome of this case. *Ibid.* Alaska has no need to respond to matters that cannot affect the resolution of its exceptions.

(NPCA). Alaska devotes, however, a scant three pages of its proposed sur-reply to the NPCA's arguments, stating—contrary to its claim that it needs to address the NPCA's "new arguments" (AK Mot. 6)—that "[t]he Court cannot consider the arguments of the amicus that the United States has never raised." Sur-Reply 9. In any event, the Court's Rules do not provide that a party filing exceptions is entitled to respond to an amicus curiae supporting the master's report. The Court has previously declined to allow a sur-reply in original actions, notwithstanding the filing of amicus curiae briefs. See *New Jersey* v. *New York*, 521 U.S. 1149 (1997); *Nebraska* v. *Wyoming*, 504 U.S. 905 (1992); 506 U.S. 938 (1992). It would be unwise to set a contrary precedent that would invite a sur-reply whenever an amicus curiae brief supporting a master's report is filed.[8]

e. Finally, Alaska contends (AK Mot. 6) that its proposed sur-reply "conforms" with the Court's Rules governing reply briefs filed under the Court's certiorari jurisdiction. But that observation is inapposite, because the Court's Rules provide for certiorari jurisdiction reply briefs, but do not provide for the filing of a sur-reply. Moreover, as described below, the proposed sur-reply seeks to reargue matters that have already received full briefing and consideration by the Special Master.

3. Allowing Alaska To File A Sur-Reply Would Not Promote The Fair And Efficient Presentation Of The Issues In This Case

The United States has consented to the filing of a sur-reply in those instances in which the United States has a basis for concluding that the additional briefing is likely to benefit the Court by providing a fair and efficient presenta-

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[8] The United States, like Alaska, has had no opportunity to respond to the NPCA brief, and the Court cannot assume that the United States would necessarily agree with any new argument that an amicus curiae might raise.

tion of the issues. See *Kansas* v. *Colorado*, *supra*; *United States* v. *Alaska*, *supra*; p. 3, *supra*. Alaska' proposed sur-reply does not meet that test.

Alaska describes its proposed sur-reply as "Alaska's first opportunity before this Court to respond to any arguments raised against the State." AK Mot. 2. The predominant theme of the proposed sur-reply itself, however, is that the United States' reply has "nothing to say" about the matters at issue, "does not answer" Alaska's contentions, and simply "parrots the Master's view." Sur-Reply 4, 13, 17. The Court can judge for itself whether the United States has responded to Alaska's exceptions; Alaska does not need a 20-page sur-reply to argue that the United States' reply is unresponsive. But setting Alaska's hyperbole to one side, the parties thoroughly briefed the decisive matters before the Master, who comprehensively addressed them in his lengthy report. For example, the Master's report specifically identifies and exhaustively examines the parties' respective positions on the historic inland waters issue. See Rep. 9-138. Alaska's proposed sur-reply would simply revisit the competing contentions.[9] The Master likewise decided all the issues

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[9] Alaska's proposed sur-reply would revisit seven subjects that received extensive attention before the Master: (1) the nature of the authority the United States must exercise to establish historic inland waters (compare Sur-Reply 12-13, with US-I Memo. 6-7, 43-44; US-I Opp. 3-5; US-I Reply 15-17; Rep. 14, 109-129); (2) comments made at, and references to, the 1903 Arbitration (compare Sur-Reply 13, with US-I Memo. 22-24, 40-42; US-I Opp. 17, 27-30; US-I Reply 18; Rep. 62 n.26, 115-119); (3) the Marguerite incident (compare Sur-Reply 14, with US-I Opp. 19-21; Rep. 21, 66-68); (4) the assertions of authority necessary to support an historic inland water claim (compare Sur-Reply 14, with US-I Memo. 7; US-I Opp. 18-19; Rep. 119-122); (5) Russia's alleged assertions of authority and the United States' alleged claims after 1867 (compare Sur-Reply 15-16, with US-I Memo. 19, 31-38, 42 n.21; US-I Opp. 3, 6-11, 15-26, 30, 35-40; US-I Reply 5-9, 12-15, 16 n.9; Rep. 45-114, 126-127); (6) the time period required for an historic water claim to ripen (compare Sur-Reply 16, with US-I Memo. 8-9, 33-40; US-I Opp. 43; Rep. 133-135); and (7) the vital interest of the United States in discouraging expansive historic inland water claims

placed before him respecting juridical bays. See Rep. 138-226. Alaska's proposed sur-reply would merely attempt to recapitulate past arguments and revive forfeited contentions.[10] And the Master gave careful attention to the status of Glacier Bay. Alaska's proposed sur-reply, again, replays disputes before the Master.[11]

Alaska's proposal to file a repetitive and unnecessary sur-reply brief is not only inefficient, but it is also unfair to the

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(compare Sur-Reply 16, with US-I Memo. 2-5; US-I Opp. 40-44; US-I Reply 20-22; Rep. 133-135).

[10] Alaska's proposed sur-reply repeats Alaska's prior arguments respecting the status of Rocky Pass and Wrangell Narrows that Alaska could have made, but did not, in its exceptions brief. Compare Sur-Reply 16-18, with US-II Memo. 24-41; US-II Opp. 4-22, 24-30; US-II Reply 11-21; Rep. 147-198. The proposed sur-reply additionally argues, for the first time, that Dry Island should be assimilated to the mainland under the test set out in *United States* v. *Maine*, 469 U.S. 504 (1985). Sur-Reply 18. The United States explained in its reply brief in this Court (at 27) that the State had forfeited such arguments because it did not raise them before the Master. The Master declined to make a recommendation on the point for that same reason. Rep. 192-193. The proposed sur-reply also addresses the issue of "geographic obviousness," again making arguments that it could have made, but did not, in its exceptions brief. See Sur-Reply 18-19. In particular, Alaska quarrels with the Master's use of "geographic obviousness" as a minimum requirement for juridical bay status despite the fact that the requirement is set out by Alaska's expert. Sur-Reply 18-19. See Gayl S. Westerman, *The Juridical Bay* 85 (1987); compare AK-II Memo. 29, 37-39, with US-II Memo. 18-22; US-II Reply 6; Rep. 212-213. The parties extensively briefed the specific requirements of Article 7. Compare AK-II Memo. 28-44 and AK-II Reply 14-24 with US-II Opp. 33-41. The Master carefully considered the parties' arguments in resolving whether the features at issue qualify as juridical bays. Rep. 198-226.

[11] The proposed sur-reply addresses four previously briefed points: (1) the scope of Section 6(e) of the Alaska Statehood Act (compare Sur-Reply 1-5, with US-IV Reply 20-24; Rep. 267-272); (2) the legislative history of Section 6(e) (compare Sur-Reply 5-6, with US-IV Memo. 37-39; US-IV Reply 20-24); (3) the relevance of *United States* v. *Alaska*, 521 U.S. 1 (1997) (compare Sur-Reply 6-7, with US-IV Memo. 37; US-IV Reply 20); Rep. 266-272; (4) the setting apart of Glacier Bay National Monument for the protection of wildlife (compare Sur-Reply 7-8, with US-IV Memo. 14-20, 38-39; US-IV Reply 12, 14-25; Rep. 253-264).

United States. Alaska had complete latitude in selecting its exceptions to the Special Master's report. Alaska knew that the United States would rely on the same arguments that it presented to the Master in defending the Master's report. Alaska also knew that, unlike in *United States* v. *Alaska*, *supra*, the parties had made no provision in advance for any sur-reply. Alaska should therefore have presented every argument it intended to make in its exceptions brief, so that the United States could respond to those arguments in its reply. Alaska instead proposes to burden the Court with a sur-reply containing arguments that the United States could readily answer if it had the opportunity.

This Court's Rules contemplate that the parties will brief cases under the constraints that those Rules impose. It is neither efficient nor fair to alter the briefing rules, contrary to customary practice, after the prescribed briefs have been filed, to one party's detriment. The United States accordingly opposes Alaska's motion for leave to file a sur-reply.

CONCLUSION

The motion of the State of Alaska for leave to file a sur-reply should be denied.

Respectfully submitted.

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OCTOBER 2004

Supreme Court, U.S.
FILED
OCT 2 1 2004
OFFICE OF THE CLERK

(9)

No. 128, Original

IN THE
Supreme Court of the United States

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Exceptions to Report of Special Master on Motions for Summary Judgment

REPLY IN SUPPORT OF MOTION OF PLAINTIFF STATE OF ALASKA FOR LEAVE TO FILE SUR-REPLY

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IN THE

Supreme Court of the United States

No. 128, Original

STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Exceptions to Report of Special Master on Motions for Summary Judgment

REPLY IN SUPPORT OF MOTION OF PLAINTIFF STATE OF ALASKA FOR LEAVE TO FILE SUR-REPLY

The United States seeks to prevent the Court from considering any response from Alaska to any arguments of the United States or its amicus. While it is not surprising that the United States would fear a brief answering those arguments, it advances no good reason why the Court should decline even to consider Alaska's responsive brief.[1]

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[1] The Court's practice, including in this case, is to consider replies in support of motions. *See, e.g.*, *Alaska* v. *United States*, No. 128 Orig. (reply in support of motion to intervene) (filed Apr. 18, 2001); *United States* v. *Booker*, No. 04-104 (reply of United States in support of motion) (filed July 29, 2004); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 16.6, at 748 n.5 (8th ed. 2002). As explained in the motion and below, Alaska asks that a similar procedure be followed for the important substantive issues in this case.

1. The United States argues that Alaska's sur-reply—in reality an initial reply brief—is "inconsistent with the Court's Rules and customary practice." U.S. Reply in Opp. to Mot. for Leave to File Sur-Reply ("Opp.") at 1. But nothing in the rules forbids responsive briefs by a party raising exceptions. And the United States' own citations show that Alaska's brief is consistent with the Court's customary practice.

The fact that some parties raising exceptions have not seen a need to file responsive briefs, *id.* at 3, says nothing about the Court's customary practice when leave *is* sought, or the propriety of Alaska's brief here. In fact, the United States concedes that the Court has granted leave more often than not. *Id.* at 3-4. That motions may not have been opposed in other cases is also immaterial, for the Court nevertheless found the responsive briefs proper and accepted them. The United States in effect proposes a self-serving rule that allows responsive briefs only when the United States or other opposing parties choose to consent—a plainly inappropriate procedure. The Court should decide for *itself* whether allowing Alaska one responsive brief in this case is "fair and efficient," *id.* at 6, rather than ceding that role to a party with a vested interest in seeing its assertions go unchallenged.

The United States cites only two instances in which leave to file a sur-reply was denied in an original action. *See* Opp. 4.[2] But in both cases, the opposing parties had each filed exceptions, which ensured that each would have at least some opportunity to respond to the related arguments of the other. *See New Jersey* v. *New York*, 523 U.S. 769 (1998); *Nebraska* v. *Wyoming*, 507 U.S. 584 (1993). It is understandable that the Court might decline to accept a party's *third* brief on the

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[2] The United States also wrongly cites instances where the Court denied *true* sur-replies—responses to reply briefs by parties that had *already* filed their own responsive briefs. *See* Opp. 4 n.5. In each of those cases, a respondent or defendant had attempted to file a further responsive brief after having already filed an opposition brief. Here, Alaska has had no responsive brief at all.

same related issues already briefed twice by each party. Moreover, the Court was already very familiar with the *Nebraska* dispute, which primarily involved the interpretation of a prior decree and had been before the Court many times in its 59-year history. *See Nebraska*, 507 U.S. at 587-590. Here, by contrast, Alaska has had no prior opportunity to file any responsive brief.

2. The United States does not explain why it is fair or equitable to forbid Alaska any opportunity to respond to any arguments of the United States or its amicus. Without denying that its amicus has raised new arguments to which Alaska has never been able to respond, the United States notes only that there were amicus briefs in the *New Jersey* and *Nebraska* cases. Opp. 6. But unlike the situation here, *both* parties in those cases filed exceptions. That is important because it allowed each party to file two briefs: an opening brief and a responsive brief in which arguments raised by opposing amici could be addressed. *See, e.g.*, Reply Brief of the State of New Jersey at *8-15, 48-49 & nn. 22 & 23, *New Jersey* v. *New York*, No. 120 Orig., 1997 WL 915795 (Aug. 29, 1997).

The United States also does not deny that it has raised challenges to the Master's report without filing exceptions, or that this strategy has short-circuited Alaska's opportunity to respond. Instead, it argues that the Court "need not reach" these challenges. Opp. 5 n.7. Obviously, the United States included these and other arguments in its brief for a reason—to influence the Court's deliberations. Simple fairness, if not due process itself, should permit Alaska a response.

Finally, the United States makes the contradictory assertions that Alaska's brief is "repetitive and unnecessary" but also raises "arguments that the United States could readily answer if it had the opportunity." Opp. 8, 9. In fact, the brief is neither unnecessary nor unfair. It is simply an initial reply brief that responds directly to the arguments of the United States and its amicus without raising any new arguments.

That brief is just as proper, and just as important, as any merits reply brief in an appellate case.

Similar to its practice in other cases, the Court requires exceptions and new briefs in original actions and does not just rest on the briefing filed with the Master. Alaska therefore properly limited its opening brief to a clear explanation of why the Master's reasoning was erroneous. The United States now contends that Alaska should have had the clairvoyance to divine every alternative argument the United States might choose to raise in response—including how it might mischaracterize Alaska's arguments, the Master's report, or the record—and preemptively address each such hypothetical argument in its opening brief. *Id.* Such prophecy is neither possible nor efficient. Moreover, the United States has *not* simply limited its brief to defending the Master's reasoning or repeating the precise arguments raised below. Rather, it has raised new arguments as well as arguments that the Master had specifically rejected.[3]

Alaska now asks only that the Court consider its rebuttals to the arguments of the United States and its amicus, just as the Court normally does where one party has challenged a decision and the other party has responded. The issues here are significant and complex, they directly implicate Alaska's sovereignty, and Alaska should be able to defend itself against arguments seeking to divest the State of its presumptively sovereign lands.

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[3] For example, on Count IV the United States raises the new (and incorrect) argument—never before raised—that two wildlife refuges identified as falling within the proviso to Section 6(e) of the Statehood Act were not created under the laws identified in the main clause. *See* Sur-Reply 3. *See also, e.g., id.* at 12 (correcting new mischaracterization of Report); *id.* at 15 (correcting new mischaracterization of record); *id.* at 19-20 (responding to assertions that the Master had rejected); *id.* at 7 n.6, 8-9 n.8, 13 n.12, 18 n.18, 19 n.19 (responding to arguments challenging Report).

CONCLUSION

For the foregoing reasons and those in the motion, the Court should grant Alaska leave to file its sur-reply brief.

Respectfully submitted,

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IN THE

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STATE OF ALASKA,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER ON MOTIONS FOR SUMMARY JUDGMENT

BRIEF OF NATIONAL PARKS CONSERVATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANT UNITED STATES OF AMERICA WITH RESPECT TO COUNT IV—GLACIER BAY

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INTEREST OF AMICUS CURIAE[1]

The National Parks Conservation Association ("NPCA") was founded in 1919, shortly after Congress passed the National Park Service Organic Act, 16 U.S.C. §§ 1-6 (1916) ("Park Service Organic Act"). NPCA was formed to advocate protection of the newly created national park system, consistent with Congress's mandate that the Executive Branch "conserve the scenery and the natural and historic objects and the wild life" in national parks and monuments and "provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* § 1.

In this case, the State of Alaska claims ownership of all of the tidal lands and marine submerged lands within Glacier Bay National Park and Preserve ("the Park"). The areas claimed by Alaska support a rich variety of wildlife and contain unique objects of historic and scientific interest that are integral to the Park's purposes.

Alaska asserts title under the "equal footing doctrine" and the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301 *et seq.*, because, it argues, Congress was not sufficiently explicit in expressing its intention that Glacier Bay be retained by the United States. Alaska effectively asks the Court to impose on Congress a new and heightened legal burden for federal retention of submerged lands, unsupported by this Court's well-established equal footing doctrine standards. If adopted by the Court, Alaska's new test not only would seriously threaten Glacier Bay, but also could be asserted to jeopardize preservation of important resources in other national parks.

NPCA and its 350,000 members have a substantial interest in ensuring that our national parks and monuments

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than NPCA, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

are preserved inviolate, as mandated by Congress. NPCA files this brief as amicus curiae to clarify Congress's intent that all of Glacier Bay National Park—including, most importantly, the "Bay" portion of the Park—be retained and protected by the United States, unimpaired for the benefit of present and future generations. Congress's intent being very plain, Alaska's claim of title to Glacier Bay necessarily is defeated.

STATEMENT OF THE CASE

Glacier Bay National Park is both spectacular and unique in its scenic beauty, the richness and diversity of its natural resources, and the opportunities for scientific study that it provides. The Park encompasses snow-capped mountain ranges rising to over 15,000 feet, coastal beaches with protected coves, deep fjords, coastal and estuarine waters, and freshwater lakes. Most notably, massive tidewater glaciers flow out of the mountains and into Glacier Bay, where huge blocks of ice up to 200 feet high break off or "calve" into the water.[2] The Park hosts an extraordinary spectrum of plant life, ranging from "pioneer species" in areas recently exposed by receding glaciers, to well-developed communities in older coastal and alpine ecosystems. The Park habitat also supports a variety of marine and terrestrial wildlife, including endangered humpback whales and large numbers of the renowned brown bear (also known as the grizzly bear), which can weigh well over 1,000 pounds.

Much of the surface area of Glacier Bay National Park is covered with water—in its frozen form, as vast areas of glacial ice, or in its liquid form, filling channels left behind as glaciers retreated over time. Marine waters make up nearly

[2] Except as otherwise indicated, the facts in this Statement of the Case regarding the Park's physical features, history, and plant and animal life are matters of public record, set forth on the National Park Service's Internet site. *See* National Park Service, Glacier Bay National Park and Preserve, Alaska, *available at* http://www.nps.gov/glba/ (last visited Sept. 7, 2004). There is no material dispute as to these facts in this case.

one-fifth of the Park. At present, Glacier Bay penetrates inland more than 60 miles, terminating in towering walls of ice at the numerous glaciers on the Bay's borders.[3] The Bay's waters ebb and flow in huge tides, which can change as much as 25 feet during a six-hour period. The lives of virtually all the animals in the Park are tied to the Bay's productive marine waters and the biologically rich tidal areas. As it was described by the National Park Service ("NPS") Director to Congress on the eve of Alaska's statehood, Glacier Bay is a "water park." *Hearings before the Senate Comm. on Interior and Insular Affairs*, 83d Cong. 1, 51 (1954) (US-IV-42) ("Hearings").

Glacier Bay is unique in one respect that is particularly important in this case. The Park's glaciers undergo rapid periods of accession and retreat, expanding or shrinking at tremendous rates that are unseen anywhere else in the world. In 1794, when Captain George Vancouver sailed his ship the Discovery through Icy Strait, what is now Glacier Bay was a mere five-mile-deep indent in a solid ice face that was in places 4,000 feet thick; glaciers covered nearly all of the area presently occupied by water. Yet, by 1879, John Muir reported that the giant wall of ice had retreated more than 30 miles from the mouth of the Bay. Many of the major glaciers in the Park have continued to retreat since then. *See* Appendix A (attached). In the future, many, if not all, of the waters in the Park today may again be filled by advancing glaciers.[4] Distinctions between "uplands," "tidal areas," and "submerged lands" are far less sharp and significant in this glacier ecosystem because the boundary between the

[3] A map of the Park is set forth in an official NPS publication, which is attached to this Brief as Appendix A and can be found at page 88 of the exhibit of the United States labeled "US-IV-8."

[4] Whether a glacier advances or retreats and the rate of its movement depend on many factors, including snowfall rate, topography, and climate trends. At present, glacial retreat continues on the Bay's east and southwest sides, but on the west side several glaciers are advancing onto lands that are currently submerged beneath Glacier Bay.

solid-water (frozen) and liquid-water areas of the Park is in hourly flux.

The Park supports a broad range of wildlife, including, in the uplands and tidal areas, brown bears, wolves, moose, mountain goats, marmots, wolverines, and numerous other mammal and bird species. Intermittently exposed submerged lands in tidal areas are rich in food supply and are favorite grazing areas for fauna in the Park. The waters of Glacier Bay are essential feeding grounds for endangered humpback whales and habitat for gray whales, killer whales, threatened Steller sea lions, and sea otters.[5] The submerged lands under Glacier Bay host a rich concentration of shellfish and marine plant life. As a national park, Glacier Bay is one of the few significant marine ecosystems that are protected from the depletions caused by large-scale commercial fishing, crabbing, and shellfish harvesting operations.

Because of the unique opportunity in Glacier Bay to study tidewater glaciers and the effects of their advancement and retreat, as well as its diverse and abundant wildlife, in 1925 President Coolidge proclaimed Glacier Bay a national monument pursuant to the National Monument Act, 16 U.S.C. §§ 431 *et seq.* *See* Proclamation No. 1733, 43 Stat. 1988 (1925) (US-IV-1) ("1925 Proclamation"). The 1925 Proclamation creating the Monument directed that it be administered by the Department of the Interior in accordance with the National Park Service Organic Act of 1916, *see id.*, thereby ensuring that it received the same level of protection as a national park. In 1939 the United States substantially expanded the reserved area of Glacier Bay, bringing the outer coast and the submerged lands beneath the three-mile territorial sea within the Monument's boundaries. *See* Proclamation No. 2330, 4 Fed. Reg. 1661 (1939) (US-IV-2) ("1939 Proclamation"). Later renamed Glacier Bay National Park and Preserve and slightly expanded, *see* 16 U.S.C.

[5] For more details, photographs, and illustrations of the Park's tidewater glaciers and the whales and other wildlife that inhabit Glacier Bay, see the front side of Appendix A (attached), the Park brochure.

§ 410hh-1(1), the Park is unique among our national parks in that it comprises an entire glacial and marine ecosystem, including the uplands, tidal areas, and submerged lands over which eleven tidewater glaciers are advancing or retreating. Indeed, the Park is so extraordinary that it, along with nearby Wrangell St. Elias National Park and Preserve, Kluane National Park and Preserve (Canada), and Tatshenshini-Alsek Park (Canada), has been designated by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) as a "World Heritage Site."[6]

The waters and lands now comprising Glacier Bay National Park were acquired in fee simple from Russia in 1867. *See United States v. Alaska*, 423 F.2d 764, 765-766 (9th Cir. 1970). The United States undisputedly had full ownership rights to those waters and lands from that time until Alaska's admission as a state in 1959. Alaska does not seriously dispute that through the Presidential Proclamations of 1925 and 1939, the United States intended to reserve *all* of the lands making up the Monument, including the tidal and submerged lands, as national park system properties. The single question to be decided here is whether Congress intended at the time of statehood that Glacier Bay National Monument's submerged lands, as well as its uplands, be retained by the United States.

SUMMARY OF ARGUMENT

1. Under the "equal footing doctrine" and the Submerged Lands Act, the determination whether the United States retained submerged lands within federal reserved areas is a question of "federal intent." *See United States v.*

[6] World Heritage Sites are protected by international treaty because of their "outstanding physical, biological and geological formations, habitats of threatened species of animals and plants and areas with scientific, conservation or aesthetic value." United Nations Educational, Scientific, and Cultural Organization, World Heritage, *available at* http://whc.unesco.org/pg.cfm?cid=160 (last visited Aug. 30, 2004). Glacier Bay is one of only thirteen U.S. national parks to be designated as a World Heritage Site.

Alaska, 521 U.S. 1, 36 (1997). If Congress's intent that such lands would be retained by the United States was "very plain," then the presumption that title passed to the state upon statehood will be overcome. *See id.* at 36 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). Congress's intent that submerged lands be retained by the United States may be demonstrated by (a) express language of statutory enactments at or prior to the time of statehood; (b) Congress's knowledge, at the time of statehood, of an existing Executive Branch reservation that included submerged lands; or (c) evidence that the submerged lands in question were necessary to the purposes of the federal reservation. *See id.* at 41-43; *Idaho v. United States*, 533 U.S. 262, 273-274 (2001).

2. Congress plainly intended that the United States retain the submerged lands in Glacier Bay National Park.

a) The Special Master correctly found that § 6(e) of the act granting Alaska statehood, *see* Act of July 7, 1958, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 340-341 ("Statehood Act"), expressed Congress's intent that all of Glacier Bay, as a national monument set aside for the protection of wildlife, was to be retained by the United States. *See* Report of the Special Master on Six Motions for Partial Summary Judgment and One Motion for Confirmation of a Disclaimer of Title at 271-272 (2004) ("Report"). This finding alone is sufficient to defeat Alaska's claim to Glacier Bay.

b) Congress's intention that the United States would retain and protect submerged lands within national park system areas such as Glacier Bay also was expressed in the plain language of the National Monument Act of 1906 and the National Park Service Organic Act of 1916. In those statutes, Congress delegated to the Executive Branch authority to designate national monuments of historic and scientific interest and mandated that, once designated, such national monuments would be protected by the Department of the Interior and preserved "unimpaired for the enjoyment of future generations." 16 U.S.C. § 1.

c) Congress was specifically aware of the reservation of submerged lands in Glacier Bay National Monument during the time period in which it considered Alaskan statehood. Between 1946 and 1958, Congress gave extensive consideration to the disposition of federal lands in Alaska, was informed that Glacier Bay National Monument contained submerged lands that were to be retained by the United States, debated eliminating or reducing the size of the Monument, and ultimately took no action affecting the status or scope of the Monument.

d) Finally, Congress's intent that all of Glacier Bay be retained by the United States is reflected in the very purposes for which Glacier Bay was reserved: the study of tidewater glaciers (which advance over and retreat from submerged lands), the study and protection of wildlife (which inhabit and feed in tidal areas and submerged lands), and the study and preservation of ancient forest remnants (which are found on submerged lands). Alaska's primary purpose in claiming title is to open up Glacier Bay to economic uses. State title necessarily is defeated because Alaska's goal of commercial exploitation of Glacier Bay fundamentally conflicts with the purposes for which it was reserved.

ARGUMENT

I. THE UNITED STATES RETAINS SUBMERGED LANDS WITHIN FEDERAL RESERVATIONS WHERE CONGRESS'S INTENT TO DO SO IS PLAIN.

Pursuant to the "equal footing doctrine" and the Submerged Lands Act, states are presumed to take title to the submerged lands beneath inland waters and the three-mile territorial sea upon statehood. *See Alaska*, 521 U.S. at 5-6. However, the Property Clause of the United States Constitution empowers the United States to retain submerged lands along with other reserved public lands at the time of statehood where it so elects. *See id.* at 34. "Whether title to submerged lands rests with a State," this Court has held, "is ultimately a matter of federal intent." *Id.* at 36. Submerged

lands are retained where Congress's "intention was definitely declared or otherwise made very plain." *Id.* (quoting *Holt State Bank*, 270 U.S. at 55). The same standard applies to claims under both the equal footing doctrine and the Submerged Lands Act. *See Alaska*, 521 U.S. at 35-36.

In evaluating whether Congress has recognized an Executive Branch reservation in a way that "demonstrates an intent to defeat state title," the Court considers "whether Congress was on notice that the Executive reservation included submerged lands." *Idaho*, 533 U.S. at 273-274. The Court also considers whether "defeating state title to submerged lands was necessary to achieve the United States' objective" in setting aside the land. *Alaska* 521 U.S. at 42-43. If "the purpose of the reservation would have been compromised if the submerged lands had passed to the State," title to the submerged lands shall be retained by the United States. *Idaho*, 533 U.S. at 274. In *Alaska*, for example, the Court determined that the National Petroleum Reserve included submerged lands and that in retaining the Reserve generally (in § 11(b) of the Statehood Act) Congress intended to retain the submerged lands specifically because "defeating state title . . . was necessary to achieve the United States' objective [of] securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands." 521 U.S. at 42-43. "The transfer of submerged lands at statehood—and the loss of ownership rights to the oil deposits beneath those lands—would have thwarted that purpose." *Id.* at 43.

In this case, Alaska purports to apply the standard set out in *Alaska* and discussed above but actually seeks to impose a new and heightened burden of proof on the United States. According to Alaska's argument, Congress was required to "explicitly recognize" Glacier Bay National Monument *in a statute at the time of statehood* in order to avoid reversion of the submerged lands in the Monument to the State. *See* Exceptions to Report of Special Master and Brief in Support for Plaintiff State of Alaska ("Alaska Br.") at 10.

This purported test is inconsistent with the standards established by the Court's directly applicable precedents.

Under the equal footing doctrine, there is no requirement that Congress express its intention to retain submerged lands in explicit statutory language enacted at the time of statehood. In *Idaho v. United States*, for example, the Court looked to the history of negotiations between the United States and the Coeur d'Alene Tribe prior to statehood in determining that Congress had plainly intended to retain submerged lands included in the reservation set aside for the Tribe by Executive Order prior to statehood. *See* 533 U.S. at 276-281. And in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), the Court did not consider the absence of a provision in the Utah Enabling Act of July 16, 1894, to be dispositive of the question whether the United States had retained title to submerged lands in a reservation pursuant to a federal law that allowed the United States Geological Survey ("USGS") to designate lands for sites for reservoirs and irrigation canals and ditches. The Court in *Utah* ultimately concluded that the law granting authority to the USGS and a subsequent law providing that selected sites remain segregated did not reveal an intent to defeat state title, but that was because those laws did not mention submerged lands and their purposes could be achieved without reserving submerged lands. *See id.* at 203, 208. Thus, under the equal footing doctrine, Congress's intent that the United States retain reserved submerged lands may be evidenced by laws and pronouncements predating the act granting statehood and the circumstances at the time of statehood, even if the statehood act itself is silent on this matter.[7]

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[7] In *Alaska*, the Court relied on provisions of the Statehood Act to demonstrate Congress's intent to retain the submerged lands in question, but it did not indicate that *only* provisions in the Statehood Act could show Congress's intent to retain federally reserved lands in Alaska. The Court in *Alaska* relied on the Statehood Act in part because it was not clear that the executive reservations were valid or final. There was some question whether the Pickett Act granted the President the authority to

The SLA did not give states any new or additional rights to lands beneath inland waters: "Since the Act does not extend to the States any interest beyond those afforded by the equal-footing doctrine, the State can no more base its claim . . . on the Submerged Lands Act than on that doctrine." *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 324-325 (1973), *overruled on other grounds*, *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977). Rather, Congress passed the SLA in 1953 for the primary purpose of resolving certain claims made by the United States under the "paramount rights" doctrine to petroleum in lands beneath the three-mile territorial sea that had not been reserved or occupied by the United States prior to statehood. *See United States v. California*, 436 U.S. 32, 37 (1978). Section 1313(a) of the SLA lists several different exceptions to the general presumption that submerged lands pass to the states upon statehood, including an exception for lands "expressly retained by . . . the United States when the State entered the Union," 43 U.S.C. § 1313(a), which the Court has held to be no more or less stringent than the equal footing standard. *See Alaska*, 521 U.S. at 35-36. Section 1313(a) also excepts from state ownership "any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. § 1313(a). With respect to reserved lands that were owned by the United States under a claim of right based on fee simple title and were actually occupied by the United States at the time the SLA was passed and at the time of

reserve the submerged lands in the National Petroleum Reserve, so looking to § 11(b) of the Statehood Act—which specifically stated that the United States owned the Reserve—was necessary. *See Alaska*, 521 U.S. at 43-45. And the proposed executive withdrawal of the Arctic National Wildlife Refuge had not been made final by the Secretary of the Interior, *see id.* at 46, so the Court considered instead whether § 6(e) indicated an intention to retain lands that were merely the subject of an application for a withdrawal, *see id.* at 55-60.

statehood, this exception applies.[8] When read collectively, the exceptions listed in § 1313(a) do not impose a more restrictive approach for determining federal retention under the SLA than the Court applies under the equal footing doctrine. Moreover, there would be no basis to argue that Alaska gained some additional rights because it was admitted after the SLA was passed. The section of the Statehood Act that made the SLA applicable to Alaska expressly provided that Alaska would have "the same rights as [did] existing States thereunder." Statehood Act § 6(m).

In sum, the general presumption that title to submerged lands passes to the states is overcome where Congress plainly intends that such lands be retained by the United States. Congress's intent can be determined in various ways, including consideration of (a) language in statutes enacted at the time of statehood, (b) the terms of other statutes and congressional pronouncements prior to statehood, (c) evidence that Congress was on notice of an Executive Branch reservation at the time of statehood, and (d) the purposes of the reservation and whether retention of submerged lands was necessary to achieve those purposes.

[8] The Court's holding in *California*, which declined to give effect to the last exception set out in § 1313(a), is not applicable in this case. Because the SLA was passed for the very purpose of overturning the United States' "paramount rights" claim to submerged lands beneath the territorial seas that had not been reserved or occupied prior to statehood, the Court held that the final exception in § 1313(a) could not have been intended to allow the federal government to retain ownership of a subset of those lands. *See California*, 436 U.S. at 37-41. In this case, the lands in question were not merely subject to the legal doctrine of paramount rights but were "actually occupied by the United States under claim of right" at the time of Alaska's statehood. The United States at all relevant times prior to statehood had fee simple ownership of those lands and dealt with them as an integral part of an established national monument that was occupied by the Department of the Interior under the Park Service Organic Act. The last exception in §1313(a) is applicable here based on the plain meaning of its terms.

II. CONGRESS VERY PLAINLY INTENDED THAT THE UNITED STATES RETAIN THE SUBMERGED LANDS IN GLACIER BAY.

A. Section 6(e) Of The Alaska Statehood Act Expressed Congress's Determination To Retain Glacier Bay For The Purpose Of Protecting Wildlife.

The Special Master—in a thorough and well-reasoned decision—determined that Congress intended to retain the submerged lands in Glacier Bay National Monument at the time Alaska became a state in 1959. The Master first concluded that "Glacier Bay Monument, as it existed at the time of statehood, clearly included the submerged lands within its boundaries." Report at 263-264. "The descriptions of the Monument" in the proclamations that established it, the Master found, "show that the Monument necessarily embraced submerged lands." *Id.* at 264. "In addition, excluding submerged lands would undermine the purposes of studying tidewater glaciers and studying and preserving wildlife and the remnants of ancient forests." *Id.* The Master also concluded that Congress specifically expressed its intent to retain Glacier Bay, including its submerged lands, in § 6(e) of the Alaska Statehood Act, which provides for the retention of "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife," Statehood Act § 6(e). *See* Report at 271-272.

Alaska has not raised an exception to the Special Master's conclusions that both the designation of Glacier Bay National Monument in 1925 and the expansion of the Monument in 1939 included submerged lands. *See* Alaska Br. at (i).[9] Instead, Alaska argues that it is not clear Congress intended to retain the submerged lands that undisputedly formed a part of the Monument at the time of statehood. But as the Special Master correctly found, § 6(e) of the Statehood Act expressed Congress's intent that *all* of Glacier Bay, as a national monument set aside for the protection of wildlife, was to be retained by the United States. This finding is compelled by the language used by Congress, and Alaska's contrary interpretation of § 6(e) could, if adopted, result in a massive and clearly unintended expansion of Alaskan ownership of federal reserved land in Alaska. NPCA anticipates that the United States will discuss the meaning of § 6(e) in depth, and NPCA therefore will not repeat those arguments here.

[9] In two sentences of a four-sentence footnote, Alaska cites its briefs filed before the Special Master and expresses a generalized disagreement with the Master's conclusion that the reservations of the Monument included submerged lands. *See* Alaska Br. at 10-11 n.4. But Alaska does not raise this issue in its exceptions or in its Summary of the Argument and states in the other two sentences of this footnote that the Court need not address this issue.

Although it was unnecessary for the Special Master to go beyond the express provisions of the Statehood Act to find sufficient evidence of congressional intent, this Court also should consider, in its exercise of *de novo* review, (1) other relevant congressional enactments, (2) Congress's specific consideration of Glacier Bay prior to 1959, and (3) the purposes for which Glacier Bay was reserved and the effects of state ownership on those purposes, all of which confirm the Special Master's conclusion that Alaska's claim fails as a matter of law.

B. Congress Intended That Submerged Lands Integral To Reserved National Parks And Monuments Would Be Retained And Protected By The United States.

Disposition of lands owned by the United States is governed by the Property Clause of the United States Constitution, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. Const. art. IV, § 3, cl. 2. Congress not only has legislative power over the public domain, but also exercises the powers of the proprietor therein, and it may deal with such lands precisely as an individual might deal with his or her own property. *Alabama v. Texas*, 347 U.S. 272, 273 (1954). Congress has "complete power" over

public lands that "necessarily includes the power to regulate and protect the wildlife living there." *Kleppe v. New Mexico*, 426 U.S. 529, 540-541 (1976). It is for Congress and not the courts to say how the public lands shall be administered. *United States v. City & County of San Francisco*, 310 U.S. 16, 26 (1940).

In the 19th and early 20th centuries, it was well established that the Executive Branch had authority to reserve public lands for appropriate purposes, even without congressional authorization. *See Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1867). The Executive Branch was charged with disposition of the public domain, and it reserved and withdrew lands "by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many states and territories." *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915). These orders were well known to Congress, and in not a single instance was an Executive reservation or withdrawal subsequently disapproved. *See id.*

It was against this backdrop that Congress enacted the National Monument Act of 1906, which provided:

> [t]he President of the United States is authorized, in his discretion, to declare by public proclamation . . . objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land . . . .

National Monument Act of 1906, Pub. L. No. 59-209, § 3060, 34 Stat. 225 (codified 16 U.S.C. § 431) (also known as the "Antiquities Act"). Pursuant to this authority, President Theodore Roosevelt proclaimed eighteen national monuments during his term of office ending in 1912, including major reservations such as Grand Canyon, Arizona; Mount Olympus, Washington; Natural Bridges, Utah; and Lassen Peak, California. *See Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1179 n.4 (D. Utah 2004). The broad authority of the Executive Branch to declare certain lands to be national monuments and reserve them under the Act was confirmed by the Court in *Cameron v. United States*, 252 U.S. 450, 455-456 (1920).

In 1916, Congress passed the National Park Service Organic Act of 1916, Pub. L. No. 64-235, 39 Stat. 535 (codified as amended at 16 U.S.C. §§ 1-18f), which created the National Park Service within the Department of the Interior to manage and protect national parks and national monuments. *See* 16 U.S.C. § 1. The Act established the national policy of protecting "the fundamental purpose of the said parks, *monuments*, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them *unimpaired* for the enjoyment of *future generations*." *Id.* (emphasis added).

The plain language of the National Monument Act and the Park Service Organic Act expresses Congress's intention that lands (including submerged lands) reserved as part of the national park system would be retained and protected by the United States. This conclusion is confirmed by the historical development of other important national parks. For example, Grand Canyon National Monument was established by Presidential Proclamation in 1906, prior to Arizona's admission into the Union. *See* Proclamation No. 794, 35 Stat. 2175 (1908). It was not designated as a national park until 1919. *See* Act of Feb. 26, 1919, Pub. L. 65-277, 40 Stat. 1175. The Arizona Statehood Act (June 10, 1910) did not specifically list submerged lands in the Grand Canyon National Monument as being retained by the United States—indeed, it did not mention the Grand Canyon at all. *See* Pub. L. No. 61-219, 36 Stat. 557. Yet the State of Arizona has never been viewed as having ownership rights to conduct mining operations or other activities in the bed of the Colorado River within Grand Canyon National Park in Arizona. *Cf. Lesoeur v. United States*, 21 F.3d 965, 967 n.2 (9th Cir. 1994) (noting dispute between United States and an Indian

Tribe, but not the State of Arizona, over ownership of the Colorado River in Grand Canyon National Park).

The reason such rights have not been asserted—and would have no basis in law—is that Congress's intent that the United States retain and protect all national parks and national monuments, including submerged lands therein, was made clear in the National Monument Act and the Park Service Organic Act. Under Alaska's version of the law, however, states could assert supposedly superior presumed rights to submerged lands in these and other national park system areas, in fundamental conflict with Congress's power under the Property Clause of the Constitution and Congress's mandate expressed in the Park Service Organic Act. With respect to national parks and monuments, including Glacier Bay, Congress plainly intended to retain all of the lands under the control of the Department of the Interior, unimpaired for future generations, and necessarily to defeat state title in doing so.

C. Congress Was On Notice At The Time Of Statehood That Glacier Bay National Monument Contained Submerged Lands And That The Monument Would Be Retained By The United States.

The Statehood Act divided the publicly held lands in the Territory of Alaska between the State and the United States. The Act gave Alaska title to "all property real and personal, title to which is in the Territory of Alaska or any of the subdivisions," but made clear that "[e]xcept as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands." Statehood Act § 5. The Statehood Act also gave Alaska the opportunity to select, within 25 years after its admission, hundreds of thousands of acres of land to which title was retained by the United States. *Id.* § 6(a), (b). To be eligible for selection, however, most of the land had to be "vacant, unappropriated, and unreserved." *Id.* This apportionment of lands was the subject of extensive discussion in the period leading up to statehood.

Some members of Congress considering Alaska statehood were concerned that the statehood bill not "give Alaska just the remains after everybody else has picked it dry." Hearings, at 1 (US-IV-42). To address this concern, Congress considered a "reduction in the size of some of the Federal reservations, including the national parks and national monuments." *Id.* Before it could make such a reduction, however, Congress sought to gain "a broader understanding of the location of the lands reserved, and the views of the Department [of the Interior] as to the extent to which they could become restricted or whether they could be abolished." *Id.* at 10. The Committee on Interior and Insular Affairs called before it, among other officers of the United States, the Director of the National Park Service, Conrad Wirth. Mr. Wirth testified at length about the need to retain Glacier Bay National Monument under NPS management and protection. *See id.* at 46-53. Mr. Wirth opposed suggestions that the Monument was no longer needed because one of its glaciers had receded beyond the Monument's boundaries, noting that many other glaciers remained in the Monument. *See id.* at 47-48.

In the end, while a few members of Congress advocated reducing or eliminating Glacier Bay National Monument, Congress took no such action. In contrast, Old Kasaan Monument—which Mr. Wirth stated was no longer needed because the totem poles it was set aside to preserve had disappeared—was abolished. *See* Act of July 26, 1955, Pub. L. No. 84-179, 69 Stat. 380. During the period from 1946 through 1958 when the Alaska Statehood Act was under consideration, Congress eliminated at least eight national monuments,[10] but left Glacier Bay unaltered.

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[10] Father Millet Cross National Monument, N.Y. (Pub. L. No. 81-292, 63 Stat. 691, Sept. 7, 1949); Holy Cross National Monument, Colo. (Pub. L. No. 81-648, 64 Stat. 404, Aug. 3, 1950); Wheeler National Monument, Colo. (Pub. L. No. 81-652, 64 Stat. 405, Aug. 3, 1950); Shoshone Cavern National Monument, Wyo. (Pub. L. No. 83-360, 68 Stat. 98, May 17, 1954); Old Kasaan National Monument, Alaska (Pub. L. No. 84-179, 69 Stat. 380, July 26, 1955); Castle Pinkney National Monument, S.C. (Pub. L. No. 84-447, 70

During its deliberations regarding the future of Glacier Bay, Congress was expressly informed that the Monument contained submerged lands. Mr. Wirth described the Monument in his testimony as "a series of glaciers on a mountain range, with the Glacier Bay going up through the center" and provided an acreage figure that included submerged lands. Hearings, at 46 (US-IV-42); *see* John D. Coffman and Joseph S. Dixon, *Report on Glacier Bay National Park (Proposed), Alaska* at 1 (Dec. 20, 1938) (US-IV-9) ("Coffman & Dixon") (providing acreage figures). Mr. Wirth further explained that roads on the uplands of the Monument were unlikely to be necessary because the Monument was a "*water park*." *See* Hearings, at 51 (US-IV-42) (emphasis added).

To assist Congress in its deliberations regarding Alaska statehood and the apportionment of lands in Alaska, the Department of the Interior prepared an atlas titled "Alaska: Federal Land Withdrawals and Reservations." *See Alaska: Federal Land Withdrawals and Reservations* (US-IV-46) ("Atlas"). This atlas was made available at the 1954 hearing at which Mr. Wirth testified about whether any national monuments could be reduced or eliminated prior to statehood, *see* Hearings, at 10 (US-IV-42), and a version of the atlas was entered into the Congressional Record in 1957, *see Hearings Before the Subcom. on Territorial and Insular Affairs of the Com. on Interior and Insular Affairs*, 85th Cong. 1, 195-196 (1957) (US-IV-45). The atlas shows that Glacier Bay National Monument was one of the areas reserved by the United States. *See* Atlas (US-IV-46). More importantly, the atlas shows that the boundaries of the Monument extended beyond the outer coastline to include open ocean and submerged lands outside of Glacier Bay and that the boundary cut through Cross Sound and Icy Strait, including some of the waters and submerged lands but not

Stat. 61, Mar. 29, 1956); Verendrye National Monument, N.D. (Pub. L. No. 84-846, 70 Stat. 730, July 30, 1956); and Fossil Cycad National Monument, S.D. (Pub. L. No. 84-891, 70 Stat. 898, Aug. 1, 1956).

others within the Monument. *See id.* The atlas shows that Congress knew that Glacier Bay National Monument was being retained by the United States and knew that the Monument contained submerged lands. Indeed, this Court held in *Alaska* that the very same atlas, by including the Arctic National Wildlife Range, put Congress "on notice" at the time it passed the Statehood Act that the federal government had reserved the submerged lands depicted in the map of the Range. *See* 521 U.S. at 56 & n.2.

Congress also was aware that the United States intended to retain Glacier Bay National Monument as a result of its consideration of prior versions of the proposed statehood bill. House Resolution 206 would have transferred to Alaska "all public property and all vacant unappropriated lands" except, *inter alia*, "Mount McKinley National Park" and "Glacier Bay National Monument, as established, described, and delimited in the proclamation of the President of the United States dated February 26, 1925 (43 Stat. 1988)." H.R. 206, 80th Cong. at 2 (1947) (US-IV-43). In response to a complaint that this bill would have transferred to Alaska Katmai National Monument (because it was not specifically listed as retained), the Delegate who introduced the bill (E.L. Bartlett) explained that Katmai was no longer of any special significance because the natural phenomena that justified its creation had ceased to exist. *See* Letter from Bartlett to Packard of Feb. 3, 1947, at 1-2 (US-IV-44). In contrast, Delegate Bartlett observed that "with one trifling exception" no one had suggested that "the status of Glacier Bay National Monument" be changed because it had "splendid potentialities." *Id.* at 2.[11]

In sum, Congress's knowledge about and treatment of Glacier Bay during the period prior to statehood demon-

[11] Congress's decision to move from a bill (House Resolution 206) that granted all lands to Alaska except those specifically listed by name to a bill (the Statehood Act) that instead described general categories of property shows that Congress felt no need to list properties by name in order to retain them.

strate that Congress intended the United States to retain title to *all* of the Monument.

D. Federal Retention Of The Submerged Lands In Glacier Bay National Monument Was Necessary To Further The Purposes For Which The Monument Was Created.

1. The Purposes Of Glacier Bay National Monument Required The Inclusion Of Submerged Lands.

The 1925 Proclamation establishing Glacier Bay National Monument stated that it was being reserved to provide a unique opportunity for the scientific study of (1) "glacial behavior," (2) the "resulting movements and developments of flora and fauna," and (3) "certain valuable relics of ancient interglacial forests." 43 Stat. at 1988-1989 (US-IV-1). The 1939 expansion also was intended to further these purposes. *See* 1939 Proclamation, 4 Fed. Reg. at 1661 (US-IV-2) (noting protection of "objects of scientific interest" in the Monument). Each of these purposes would have been undermined by dividing Glacier Bay National Monument into two parts, one upland and one submerged, and transferring title to the submerged lands to Alaska.

First, as the Special Master concluded, the study of the "tidewater glaciers" present in the Monument required the preservation of the submerged land portion of the Monument. *See* Report at 246-248. Tidewater glaciers advance and retreat over time. *See id.* at 246. Over the past two hundred years, the glaciers of Glacier Bay have experienced profound changes. In 1794, glaciers covered almost the entirety of Glacier Bay. *See* Dennis C. Trabant, *Expert Witness Report for Glaciology Relating to Claims to Submerged Lands in Glacier Bay, Alaska* at 2 (US-IV-5) ("Trabant"). Between the middle of the 18th Century and the beginning of the 20th Century, one particular glacier, Johns Hopkins Glacier, retreated as much as 100 kilometers, or 62 miles. *See* Bruce F. Molnia, *The State of Glacier Science and its Relationship to the Submerged Lands Adjacent to and Beneath the Tidewater Glaciers of Glacier Bay at the Time of the Founding and Expansion of Glacier Bay National Monument, Alaska* at 9 (US-IV-4). The movement of glaciers and the resulting covering and uncovering of land with liquid water are reason enough to conclude that a monument designed to facilitate the study of glaciers must include currently submerged lands. Because tidewater glaciers in Glacier Bay rest on the very submerged lands at issue in this case, *see* Declaration of Tomie Patrick Lee at 4 (US-IV-8), studying the movement of glaciers requires the study of the sea floor, *see* Trabant at 6 (US-IV-5). "Glacier Bay would not be an effective area for the study of tidewater glaciers if the submerged lands were excluded." *Id.* at 7; *see* Report at 247 (adopting Trabant's conclusion). As the Master observed, as far back as 1914 scientists recognized the relationship between glaciers and the sea floor. *See* Report at 248 n.70.

Second, retention of the submerged lands in Glacier Bay was necessary for the study and protection of the wildlife within the Monument. The 1925 Proclamation stated that a purpose of the Monument was to study "the movements and developments of flora and fauna" and made clear that the Monument was to be supervised, managed, and controlled by the National Park Service pursuant to the Park Service Organic Act of 1916, which required the Monument to be administered "to conserve . . . the wild life therein," 16 U.S.C. § 1. *See* 1925 Proclamation, 43 Stat. at 1988 (US-IV-1).[12] As the Master found, excluding submerged lands from the Monument would have undermined the protection of wildlife including, specifically, brown bear. *See* Report at 253-255. Numerous animals use both the uplands of the Park and the submerged lands. Brown bears "eat barnacles and rye and sedge grasses on tidelands and swim to islands to gather

[12] Alaska's suggestion that a purpose of the Monument was to allow scientists to *study* wildlife but not to *protect* wildlife, *see* Alaska Br. at 21, should be rejected out of hand, as it was by the Special Master, *see* Report at 254.

seabird eggs." *Id.* at 254 (citing Victor G. Barnes, Jr., *Brown Bear Use of Marine Habitats in Alaska with Emphasis on Glacier Bay* at 6-12 (2000) (US-IV-6)). Many marine animals—such as the whales, porpoises, and seals mentioned in the 1938 report on the proposed expansion of the Monument, *see* Coffman & Dixon at 9, 10 (US-IV-9)—live in Glacier Bay itself.

Third, retention of the submerged lands at the time of statehood was necessary to facilitate the scientific study of "certain valuable relics of ancient interglacial forests." 1925 Proclamation, 43 Stat. 1988-1989 (US-IV-1). As the Master explained, the "retreat of some glaciers in the Glacier Bay area during the 19th and early 20th century revealed remnants of ancient trees that had been buried underneath ice for millennia." Report at 251. Some of these remnants "rest on submerged lands." *Id.* Alaska suggests that retention of all of the submerged lands in Glacier Bay was not necessary to protect the ancient forests presumably because the forests are not located on all of the submerged lands in the Park. *See* Alaska Br. at 10-11 n.4. As the Master determined, however, the proper inquiry is not whether any particular square foot of submerged land was necessary to the Monument but whether exclusion of the submerged lands as a whole would impair the Monument. *See* Report at 252 (citing *Alaska*, 521 U.S. at 40-41).

The submerged lands beneath Glacier Bay were not just accidentally included in the Monument's boundaries. They were included because they were integral to the purposes of the Monument: studying glaciers, wildlife, and remnants of ancient forests.

2. State Ownership Would Conflict With The Purposes For Which Glacier Bay Was Reserved.

Alaska's stated rationale for asserting title to the submerged lands beneath Glacier Bay (halting and reversing the phase-out in the Bay of commercial fishing), its expressed desires for future uses of the Bay (increased cruise ship traffic), and its actions in other protected areas illustrate the fundamental inconsistency of state ownership with the Park's purposes. State ownership of the submerged lands beneath Glacier Bay would result in significant risk of impairment of Glacier Bay National Park and, at a minimum, would likely result in disputes and protracted litigation between Alaska and the United States over management of the Park.

a. As a part of the National Park System, Glacier Bay National Park is subject to federal legislation and regulations designed to protect and conserve the natural objects and wildlife within the Park, including the Park Service Organic Act itself. *See* Robert B. Keiter, *Symposium: The National Park System: Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 Denv. U. L. Rev. 649, 675 (1997) (The Park Service Organic Act's "'nonimpairment' standard indicates that resource preservation responsibilities should take precedence over public use in the event of a conflict.").

Management of Glacier Bay by the NPS must conform to the requirements of the Endangered Species Act, which requires federal agencies to ensure that agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *See* 16 U.S.C. § 1536(a)(2). For example, the Act provides protection for endangered humpback whales and threatened Steller sea lions, both of which are found in the waters of Glacier Bay. The NPS also is subject to the National Environmental Policy Act ("NEPA"), which requires all federal agencies to prepare an environmental impact statement regarding proposed major federal actions that significantly affect the environment. *See* 42 U.S.C. § 4332(2)(C). Glacier Bay National Park is subject to the 1976 Mining in the Parks Act, which authorizes the Secretary of the Interior to promulgate regulations governing mining operations on National Park System lands in order "to preserve for the benefit of present and future generations the pristine beauty of areas of the National Park Sys-

tem, and to further the purposes of" the Organic Act. *See* 16 U.S.C. § 1902. The regulations promulgated pursuant to that Act prohibit mining absent approval of a plan of operations, which must include an environmental analysis. *See* 36 C.F.R. § 9.9(a), (b)(9). The Wilderness Act of 1964, which prohibits most development in designated wilderness, *see* 16 U.S.C. § 1133(c), also applies to Glacier Bay, parts of which have been so designated.

In addition to these generally applicable federal laws, statutes applicable specifically to Glacier Bay govern commercial fishing in the Park. An appropriations bill passed in 1998 and modified in 1999 closed some upper portions of the Bay entirely to fishing, sharply limited fishing within other portions of the Bay to grandfathered fishermen (who received nontransferable, lifetime permits to fish only for Tanner crab, halibut, and salmon), and provided compensation to affected fishermen. *See* Omnibus Consolidated and Emergency Supplemental Appropriation Act for FY 1999, Pub. L. No. 105-277, § 123, 112 Stat. 2681, 2681-259 - 2681-261 (1998) (codified 16 U.S.C. § 410hh-NOTE); Emergency Supplemental Appropriations, Pub. L. No. 106-31, § 501, 113 Stat. 57, 72-73 (1999); *see also* 36 C.F.R. § 13.65(a). Once the grandfathered fishermen cease fishing, all commercial fishing in the Bay will be prohibited, making Glacier Bay the only marine coastal environment in Alaska that is entirely protected from the adverse effects of commercial fishing.

Federal regulations promulgated by the National Park Service pursuant to the Park Service Organic Act govern activities in Glacier Bay and protect the Park's natural resources. Current regulations limiting the entry of boats (including fishing vessels and cruise ships) into Glacier Bay were extensively reviewed in a recent Environmental Impact Statement.[13] To enter the Bay a commercial vessel

[13] *See* Vessel Quotas and Operating Requirements—Final Environmental Impact Statement, *available at* http://www.nps.gov/glba/InDepth/learn/preserve/issues/vessels/VQOR/feis_2003.htm (last visited Sept. 7, 2004).

must have a permit issued by the Park, which requires cruise ship companies to implement an approved "pollution minimization plan." 36 C.F.R. § 13.65(b)(2)(i), (ii). The Park is permitted to issue a limited number of permits; only two cruise ships are allowed per day. *Id.* § 13.65(b)(2)(v). The regulations generally prohibit the operation of a vessel within one-quarter nautical mile of a whale, provide for speed limitations in designated "whale waters," and close some waters to vessels entirely. *Id.* § 13.65(b)(3)(i), (iv), (vi), (vii). They also prohibit "[o]ff-boat activity from a commercial vessel," *id.* § 13.65(b)(2)(F), impose noise restrictions, *id.* 13.65(b)(3)(viii), and limit visible vessel emissions, *id.* § 13.65(b)(4).

Hunting is forbidden in the Park (except in the Preserve), as is "feeding, touching, teasing, frightening or intentional disturbing of wildlife." *See* 36 C.F.R. § 2.2(a)(1), (2).[14] Use of aircraft is limited to designated areas for limited purposes. *See id.* § 2.17; 43 C.F.R. § 36.11(f). Use of motor vehicles is prohibited "except on park roads, in parking areas and on routes and areas designated for off-road motor vehicle use." 36 C.F.R. § 4.10(a). Operating a business or engaging in building construction requires a permit. *See id.* §§ 5.3, 5.7.

b. Alaska's approach to resource management contrasts sharply with the federal approach described above. Alaska has proclaimed by statute that it has "not assented to federal control of fish and game in Glacier Bay National Park and Preserve or the navigable waters within or adjoining the park and preserve." Alaska Stat. § 16.20.010(a)(2)(B). However, Alaska has not taken any steps to designate those submerged lands as protected under state law.[15] Rather,

[14] *See also* Glacier Bay National Park & Preserve, Basic Park Regulations, *available at* http://www.nps.gov/glba/InDepth/visit/regs.htm (last visited Aug. 25, 2004).

[15] The State has not designated Glacier Bay as a State Park, *see* Alaska Stat. § 41.21.110-§ 41.21.180, a State Game Refuge, *see id.* § 16.20.010-§ 16.20.080, a State Fish and Game Critical Habitat Area, *see*

Alaska's stated intentions with respect to Glacier Bay and its previous actions in other protected areas indicate that Alaska likely would attempt to exploit the natural resources of Glacier Bay for commercial purposes.

In 1999 then-Governor Tony Knowles stated: "It's time to resolve, once and for all, the issue of where federal jurisdiction ends and state jurisdiction begins in Southeast Alaska." *See* Svend Holst, *Knowles Sues for Control over Bay*, The Juneau Empire, Nov. 26, 1999, at 1. He explained that Alaska's need to preserve commercial and subsistence fishing in Glacier Bay had motivated Alaska's suit to quiet title to the submerged lands. *See* Mark Sabbatini, *State Sues over Glacier Bay*, The Juneau Empire, Mar. 4, 1999.

Alaska has clearly stated its desire to increase the amount of cruise ship traffic in Glacier Bay. In a recent letter to the Department of Interior, Governor Murkowski said: "Increased entries would be good for the economy of Southeast Alaska and would enable thousands of additional Americans to see the wonders of Glacier Bay." *See* Letter from Murkowski to Griles of Mar. 25, 2004, at 4. In its written comments on NPS' Draft Environmental Impact Statement regarding vessel quotas and regulations, Alaska took the position that use of motorized vehicles in the Bay is a "traditional activity" that, under the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq.*, must be permitted.[16] Increased cruise ship and vessel traffic in Glacier Bay would create substantial risks of impairment of Park resources. In July 2001 a cruise ship hit and killed a

id. § 16.20.500-§ 16.20.690, or a State Game Sanctuary, *see id.* 16.20.090-16.20.162.

[16] *See* Letter from Murkowski to Swanton of May 14, 2003, at 2, 4, 5, *available at* http://www.nps.gov/glba/InDepth/learn/preserve/issues/vessels/ VQOR/files/FEIS/Volume2/Appendices/AppendixM.pdf at 7, 11, 13 (last visited Aug. 25, 2004).

pregnant humpback whale.[17] Smoke stack emissions from cruise ships can leave a visible haze in the air, and in Southeast Alaska from 1993 to 1999, there were at least 14 vessel accidents, including one in Glacier Bay.[18]

Under state management, there is also the prospect that floating lodges could be constructed in Glacier Bay. In Prince William Sound, which is surrounded by Chugach National Forest, the Alaska Department of Natural Resources has approved construction of eight floating inns in the tidelands.[19] State management of Glacier Bay might also permit "mariculture"—commercial farming of oysters, clams, mussels, and other shellfish—to be introduced to the Bay. A 2002 state law required state agencies to expand opportunities for private mariculture operations.[20] Moreover, the Alaska Department of Fish and Game recently "announced plans to lift a three-year-old ban on [new] clam farms in the Kachemak Bay and Fox River Flats Critical Habitat areas" and allow new leases for mariculture.[21] Such operations are

[17] *See Park Confirms Pregnant Humpback Was Killed by Cruise Ship*, Kenai Peninsula Online, Sept. 26, 2001, *available at* http://www.peninsulaclarion.com/stories/092601/ala_092601alapm0010001.shtml (last visited Aug. 25, 2004).

[18] *See* Vessel Quotas and Operating Requirements, Final Environmental Impact Statement, § 4.61, *available at* http://www.glba.ene.com/files/FEIS/Volume1/MainDocument/Chapter4/Sections/Section4.6.pdf (last visited Aug. 25, 2004); Needs Assessment for a Major Fuel Oil Spill, Glacier Bay National Park and Preserve § 4.2, at 10-11 (May 2000), *available at* http://www.nps.gov/glba/InDepth/learn/preserve/issues/vessels/spill_assessment.pdf (last visited Aug. 25, 2004).

[19] *See* Sally Deneen, *Alaska's Prince William Sound Braces for Nonstop Tourism*, The Environmental Magazine, June 17, 2003, *available at* http://www.enn.com/news/2003-06-17/s_4777.asp (last visited Aug. 25, 2004).

[20] *See* Jackie Timothy, Alaska Department of Fish and Game, 2002 Annual Mariculture Report at 5 (June 2003), *available at* http://www.cf.adfg.state.ak.us/geninfo/pubs/rir/5j03-09.pdf (last visited Aug. 25, 2004).

[21] Hal Spence, *Clam Farm Ban Could Be Lifted*, Kenai Peninsula Online, July 29, 2004, *available at* http://www.peninsulaclarion.com/sto-

currently carried out in Kachemak Bay State Critical Habitat Area.[22]

It is also reasonable to expect that if Alaska owned the submerged lands within the Park it would attempt to permit exploration for and extraction of any minerals or other natural resources that might be present. Alaska's current Governor "ran for election in 2002 on a natural resources development platform" and sees more oil production as the key to the State's fiscal woes.[23] That natural resources may be located within an environmentally-sensitive protected area does not dampen the State's enthusiasm for development. While calls for oil drilling in the Arctic National Wildlife Refuge recently have been rejected by Congress, Alaska's current Governor has long favored drilling there. *See* Jessica Mathews, *Get Real, Alaska; ANWR Is Not the Answer*, Anchorage Daily News, Oct. 28, 1995, at 6B. Following a decision by the Alaska Supreme Court enjoining oil exploration in Cook Inlet between the Redoubt Bay Critical Habitat Area and the Trading Bay Fish and Game Refuge, the State Legislature stepped in and passed a bill effectively terminating a lawsuit related to that project.[24] Indeed, the last two

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http://www.peninsulaclarion.com/stories/072904/new_072904new002001.shtml (last visited Aug. 25, 2004).

[22] *See* Tom Kizzia, *State Offers New Mariculture Sites*, Anchorage Daily News, Dec. 30, 2003, *available at* http://www.adn.com/front/story/4565205p-4538051c.html (last visited Aug. 25, 2004).

[23] Marsha Herbst, *Natural Gas, Oil Exploration Top Agenda*, Juneau Empire, Jan. 16, 2003, *available at* http://www.aklegislature.com/hitchhiker/2004/stories/natgasoil.shtml (last visited Aug. 31, 2004); Mike Chambers, *Murkowski Seeks Solutions in Oil Drilling*, Juneau Empire, Oct. 28, 2002, *available at* http://www.aklegislature.com/stories/102802/murkowski.shtml. (last visited Aug. 31, 2004).

[24] *See* Cathy Brown, *Governor Signs Bill Limiting Environmental, Other Lawsuits: Environmentalists Say Measure Shuts Courthouse Door to the Public, but not to Industry*, Juneau Empire, June 15, 2003, *available at* http://www.aklegislature.com/stories/061503/environbill.shtml (last visited Aug. 31, 2004); Hal Spence, *Amendment May Allow State To Waive Review for Forest Oil Cook Inlet Well: Senate Tries To Reverse Court Action*, Kenai Peninsula Online, May 13, 2002, *available at*

times the State of Alaska has sought a declaration that it, not the United States, owned submerged lands within a federal reserve, the motivation behind Alaska's claim was a desire to drill for oil or gas in submerged lands in the protected areas. *See Alaska*, 521 U.S. at 4-5 (oil in the Arctic National Wildlife Reserve); *Alaska*, 423 F.2d at 765-766 (oil and gas beneath Tustumena Lake in the Kenai Moose Range).

c. The differing approaches of the federal government and Alaska to resource development would likely lead to substantial conflicts over Park management if Alaska were granted title to the submerged lands in the Park. This Court has indicated that ownership of submerged lands generally provides the authority to control navigation, fishing, and other commercial activity. *See Utah Div. of State Lands*, 482 U.S. at 195. The SLA, moreover, grants States "the right and power to manage, administer, lease, develop, and use . . . in accordance with applicable State law" lands "beneath navigable waters within the boundaries of the respective States" and "the natural resources within such lands and waters." 43 U.S.C. § 1311(a). While Congress would retain substantial authority to regulate activities in Glacier Bay,[25] and the National Park Service would retain its authority under existing federal regulations, Alaska would be expected to resist and dispute federal restrictions. At a minimum, state ownership of the submerged lands beneath Glacier Bay would lead to uncertainty regarding the respective authority of the State and the NPS over an ecosystem that could effectively be divided in two.

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http://peninsulaclarion.com/stories/051302/new_0513020003.shtml (last visited Aug. 31, 2004).

[25] The United States could regulate the navigable waters of Glacier Bay and any commercial activity in the Bay (such as cruise ship traffic and commercial fishing) under Congress's commerce clause authority, *see, e.g., Gibbons v. Ogden*, 22 U.S. 1, 89 (1824); *see generally United States v. Lopez*, 514 U.S. 549 (1995), and could "regulate conduct off federal land that interferes with the designated purpose of that land" under Congress's Property Clause authority, *Minnesota v. Block*, 660 F.2d 1240, 1249-1250 (8th Cir. 1981).

The Boundary Waters Canoe Area ("BWCA") in Minnesota, for example, "[h]as long been a source of conflict between state and federal regulatory authority as a result of the area's bifurcated state federal ownership structure." Blake Shepard, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Property To Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. Envtl. Aff. L. Rev. 479, 507 (1984). Because Minnesota owns the beds of lakes and streams while the United States owns most of the uplands in the BWCA, attempts at divided management have "created a great deal of confusion and litigation." *Id.* at 509. Similar confusion and litigation would be expected if this Court were to hold that Alaska owned the submerged lands in Glacier Bay. As a result, scarce NPS resources would be invested in defending park values from proposed state actions rather than in the Park's current resource protection program.

Glacier Bay is the largest protected marine environment in the United States and one of the most important marine research and protected areas in the world. The essential physical and scientific values of the Park lie in the intersection between the glacial environment and the marine environment. It is, after all, *Glacier Bay* National Park. The proclamations creating and expanding Glacier Bay included submerged lands because they were necessary to achieve the Monument's purposes of protecting and studying wildlife, glaciers, and ancient forest remnants. The fundamental conflict between the Park's long-established purposes and the State's goals in asserting title, which were as predictable in 1959 as they are apparent today, confirms Congress's intent that the submerged lands in Glacier Bay be retained and protected by the United States as an essential part of the Park.

CONCLUSION

With respect to Count IV, the decision of the Special Master should be adopted in full.

Respectfully submitted,

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September 10, 2004

Glacier Bay

Official Map and Guide

Glacier Bay National Park and Preserve
Alaska

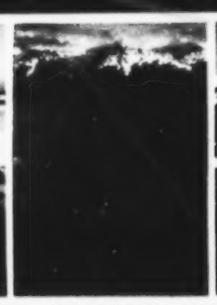
National Park Service
U.S. Department of the Interior

Appendix A (US-IV-8)

Brief of Amicus Curiae
National Parks Conservation Association

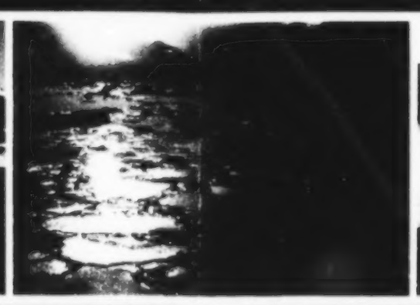
Alaska v. United States, No. 128, Original

Icebergs grounded on an island remind you how recently the world of ice prevailed in Glacier Bay



Streams immediately below glaciers often exhibit this characteristic braided pattern

The Alsek River winds through the northwestern reaches of the Park and Preserve



Pan ice shimmers on Johns Hopkins Inlet

Arc-shaped stress patterns on McBride Glacier hint at a glacier's powers

A mature spruce-hemlock forest carpets Bartlett Cove

A peaceful shoreline at Bartlett Cove holds clues to the landscape's glacial origin

Cover: Sunset from the Beardslee Islands. Photo by Tom Bean

Tidewater Glaciers

Enter Glacier Bay and you cruise along shorelines completely covered by ice just 200 years ago. Explorer Capt. George Vancouver found Icy Strait (see map) choked with ice in 1794, and Glacier Bay was a barely indented glacier. That glacier was more than 4,000 feet thick, up to 20 miles or more wide, and extended more than 100 miles to the St. Elias Range of mountains. But by 1879 naturalist John Muir found that the ice had retreated 48 miles up the bay. By 1916 the Grand Pacific Glacier headed Tarr Inlet 65 miles from Glacier Bay's mouth. Such rapid retreat is known nowhere else. Scientists have documented it, hoping to learn how glacial activity relates to climate changes.

Worldwide, the glacial facts are staggering. Glaciers and polar ice store more water than lakes and rivers, groundwater, and the atmosphere combined. Ten percent of our world is under ice today, equaling the percent being farmed. If the world's ice caps thawed completely, sea level would rise enough to inundate half the world's cities. The Greenland and Antarctic ice caps are 2 miles thick. Alaska is four percent ice.

Glaciers form because snowfall in the high mountains exceeds snowmelt. The snowflakes first change to granular snow—round ice grains—but the accumulating weight soon presses it into solid ice. Eventually, gravity sets the ice mass flowing downslope at up to 7 feet per day. The park includes some 12 tidewater glaciers that calve into the bay. The show can be spectacular. As water undermines some ice fronts great blocks of ice up to 200 feet high break loose and crash into the water. Johns Hopkins Glacier calves such volumes of ice that it is seldom possible to approach its ice cliffs closer than about 2 miles. The glaciers seen here today are remnants of a general ice advance—the Little Ice Age—that began about 4,000 years ago. This advance in no way approached the extent of continental glaciation during Pleistocene time. The Little Ice Age reached its maximum extent here about 1750, when general melting began. Today's advance or retreat of a glacier snout reflects many factors: snowfall rate, topography, and climate trends. Glacial retreat continues today on the bay's east and southwest sides, but on its west side two glaciers are advancing.

The snowcapped Fairweather Range supplies ice to all glaciers on the peninsula separating Glacier Bay from the Gulf of Alaska. Mount Fairweather, the range's highest peak, stands at 15,320 feet. Near Johns Hopkins Inlet, several peaks rise from sea level to 6,520 feet within just 4 miles of shore. The great glaciers of the past carved these fjords, or drowned valleys, out of the mountains like great troughs. Landslides help widen the troughs as the glaciers remove the bedrock support on upper slopes.

Huge icebergs may last a week or more, and they provide perches for bald eagles, cormorants, and gulls. Close by, kayakers have heard the stress and strain of melting: water drips, air bubbles pop, and cracks develop. Colors betray a berg's nature or origin. White bergs hold many trapped air bubbles. Blue bergs are dense. Greenish-blackish bergs may have calved off glacier bottoms. Dark-striped brown bergs carry morainal rubble from the joining of tributary glaciers or other sources. How high a berg floats depends on its size, the ice's density, and the water's density. Bergs may be weighed down, submerged even, by rock and rubble. A modest-looking berg may suddenly loom enormous—and endanger small craft—when it rolls over. Keep in mind that what you see is just the tip of the iceberg.

Biosphere Reserve and World Heritage Site

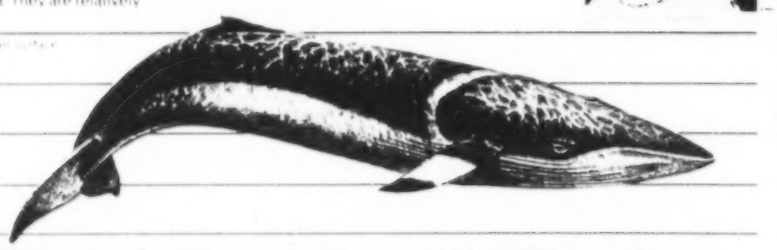
Glacier Bay National Park and Preserve was designated a national monument in 1925. Its purpose was to preserve the glacial environment and plant communities for public enjoyment, scientific study, and historic interest. Expanded several times, Glacier Bay was redesignated a national park and preserve in 1980. In 1986 the park was named a Biosphere Reserve by UNESCO. In 1992 it was listed as a World Heritage Site, the principal international recognition given to natural and cultural areas of universal significance. This dual status shows that the international community values the uniqueness of this dynamic glacial landscape, a major ecosystem that protects the diversity of life.

Biosphere Reserve MaB

World Heritage Site

Minke

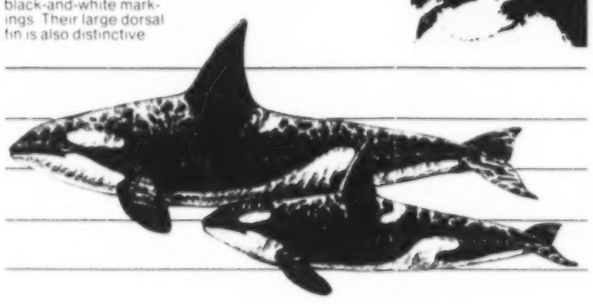
Minke whales occur throughout many oceans and are common from southern California to the Bering Sea and Chukchi Sea. They are relatively uncommon in the Glacier Bay area. In diving, the Minke shows its relatively small dorsal fin last above water



Orca

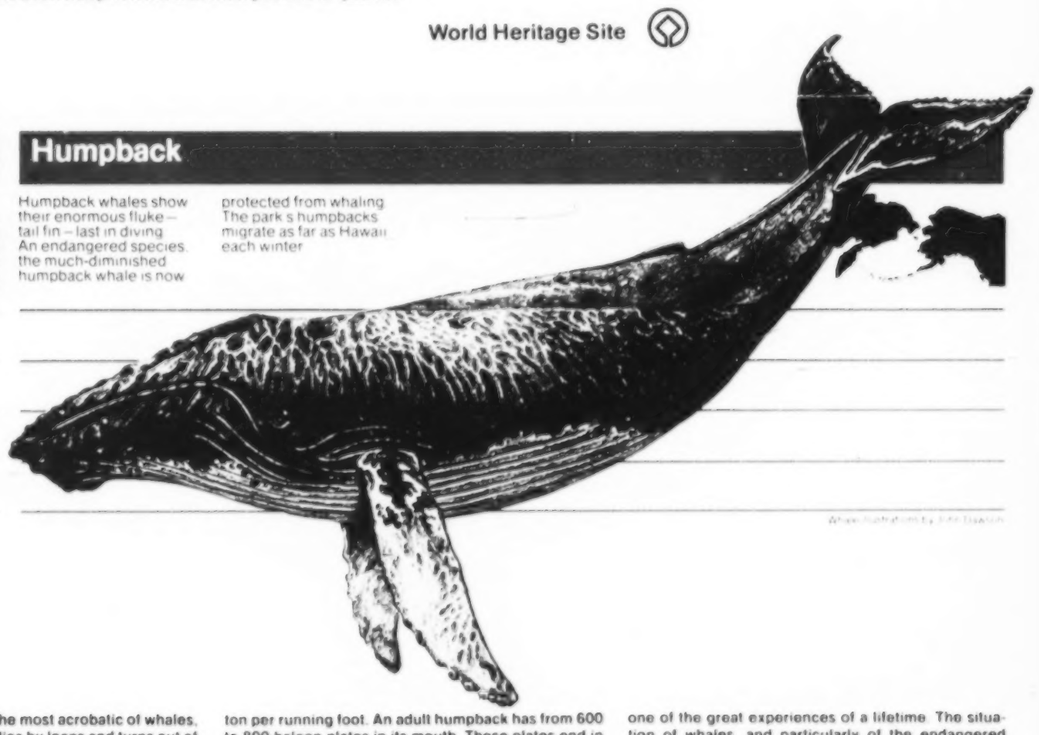
Orcas, also known as killer whales or wolves of the sea, show distinctive black-and-white markings. Their large dorsal fin is also distinctive

Carnivores, orcas feed on fish and many other marine animals



Humpback

Humpback whales show their enormous fluke—tail fin—last in diving. An endangered species, the much-diminished humpback whale is now protected from whaling. The park's humpbacks migrate as far as Hawaii each winter



The World of Whales

Whales, symbolizing the struggle to preserve nature, include the largest creatures our world has known. Blue whales weigh up to 140 tons. Sixty to 100 million years ago the ancestors of today's whales were land-dwelling, warm-blooded, air-breathing mammals who successfully returned to the seas to live. Alaskan waters boast 10 species of baleen whales and 5 toothed whales. Glacier Bay waters include baleen whales, the minke and humpback, and one toothed, the orca. The whale's appeal mixes familiarity and strangeness. Whales often live in family groups, aid each other in distress, and communicate with each other. Many observers credit whales with rational thought.

Minke whales are thought to be quite migratory and are more at home in cold northern waters than most baleen whales. (Baleen whales are named for how they feed, which is described below, under the entry for humpback whales.) Cod and pollock are their main diet here. Farther south minkes favor krill. The upper size limit of minke whales in northern waters is 33 feet. Among large whales, minkes are fast swimmers, making speeds up to 20 miles per hour. As whaling has depleted more favored species, the rich-meated minke has become the most heavily taken of baleen whales today. Their North Pacific population appears to have declined to between one-fourth and one-third its pre-whaling numbers.

Orca whales feed on various marine animals, including fish, sea lions, seals, porpoises, sharks, squid, and other whales. Also called killer whales, orcas can hunt in teams and have killed blue whales, the world's largest animals. Male orca whales average about 23 feet long; the females less. They have no natural enemies. Thought to be highly intelligent, orcas are readily trained in captivity. They can swim at a steady 29 miles per hour. Their distinctive, largely triangular dorsal fin may reach nearly 6 feet high on old males.

Humpback whales are the most acrobatic of whales, heaving their massive bodies by leaps and turns out of the water. Humpbacks are both cosmopolitan—found in all oceans—and endangered. Only about seven percent of their pre-whaling numbers remain. Coastal feeders who love shorelines, bays, and fjords, they are naturals for Alaska, which boasts nearly 34,000 miles of tidal shoreline. Humpbacks feed here on krill, shrimp, and various fish, including capelin. Humpbacks feed heavily because, unlike most birds and mammals, they do not feed year round. Humpbacks must store enough fat in summer to last the rest of the year. Adults average 40 to 50 feet long, females being the larger. Adults weigh in at about three-quarters of a ton per running foot. An adult humpback has from 600 to 800 baleen plates in its mouth. These plates end in bristles. In the feeding process, huge masses of sea organisms are scooped into the mouth. Then the water, some 150 gallons at a shot, is expelled while the plates filter *in* the edibles. Were you to stare into a humpback's mouth—which opens to 90 degrees—you might not readily discount the Biblical mishaps of Jonah. Glacier Bay humpbacks have been observed working singly or in pairs to cast a "net" of bubbles about their prey and then harvesting the hapless creatures—probably shrimp and other slower-moving organisms—caught in their airy illusion. To see these large whales in their native habitat surely counts as one of the great experiences of a lifetime. The situation of whales, and particularly of the endangered humpback whales, in Glacier Bay has recently been under intensive scrutiny by scientists. The purpose of the studies has been to learn enough about these awe-inspiring creatures to protect them. The numbers of whales present can vary dramatically from year to year. Whether these variations are wholly natural or not is uncertain. Historically, most of the available information about whales derives from attempts to hunt them, not to save them from extinction.

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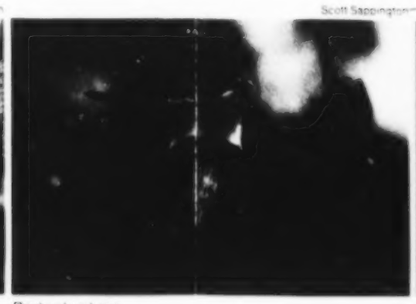
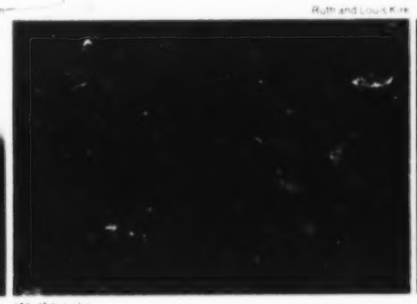
Horned grebe

Baneberry

Moose



Red columbine



Wolf tracks

Skunk cabbage

Guillemots

Plants and Animals Return to the Land

Scientists and other observers came to Glacier Bay to see the great glaciers and found here the ideal natural laboratory for the study of the infant theory of plant succession. How do plants recover a raw landscape? What happens when nature wipes the slate clean and starts over from scratch? Glacier and plant studies go hand in hand. Rapid revegetation following the glaciers' speedy retreat has enabled us to map and photograph the course of plant succession. When naturalist John Muir came to Glacier Bay in 1879 he was seeking corroboration of the continental glaciation theories of Louis Agassiz, whose controversial *Études sur les Glaciers* was published in 1840. Here, in the aftermath of retreating glaciers, Muir found a landscape not yet formed. At Glacier Bay you watch a vegetative wilderness being created—and also see its culmination in coastal forest. A trip up bay mimics glacial retreat and rolls back plant succession, from the mature forest at Bartlett Cove to the naked Earth structure at the fjords' farthest reaches. Biological succession produces profound change here in a mere decade. Earnest, long-range studies of plant succession began in Glacier Bay in 1916, with the work of Prof. William S. Cooper. His plant studies were continued in 1941 by Prof. Donald Lawrence and others. Plant recovery may begin here with no more than "black crust," a mostly algal, feltlike nap that stabilizes the silt and retains water. Moss will begin to add more conspicuous tufts. Next come horsetail and fireweed, dryas, willows, alder, then spruce, and finally hemlock forest. In many areas the final or climax stage of plant succession may be the boggy muskeg, but this may take hundreds of years to develop, after the establishment of hemlock-spruce forest. Where plant's seeds happen to land can be critical. The chaotic rock-and-rubble aftermath of a glacial romp is deficient in nitrogen. Alder and dryas are important pioneers because they improve the soil by adding nitrogen to it. Much of northern Europe and America were pioneered by dryas when the last Ice Age ended. Sitka alder begins to form dense entanglements that are the bane of hikers. Spruce takes hold and eventually shades out the alder. A forest community is begun. Each successive plant community creates new conditions. The theory holds that plant competition modifies the environment—light and moisture availability, and soil nutrients—so that plant populations also change. Over time, successive plant communities will occupy the environment, hence plant succession. The time from naked rock to revegetation is not necessarily long.

The patterns by which animals re-inhabit the land after glaciers retreat are not as neat as with plant succession. There are no true pioneer species paving the way for succeeding species. Land mammals must either walk or swim. They cannot, as plant seeds and spores do, hitch rides on wind and waves or with birds. Extensive water, ice, or mountains loom as impassable barriers. Low mountain passes are often the conduits through which land mammals begin to repopulate the park. Usually they will live off this young terrain only part of the year at first. Then resident populations may gradually build. The process of colonization at Glacier Bay and throughout Southeast Alaska is somewhat hindered by the fact that mammals in general have not had enough time since the Wisconsin Ice Age wound down to recolonize the land.

Bears, river otters, and mink can swim around ice and open water barriers to recolonize the land as glaciers leave. Mountain goats and hoary marmots can live on high ridges the ice exposed early in its retreat. Whales, Dall porpoises, and harbor porpoises find open marine corridors to the tidewater glacier fronts. Harbor seals pup on densely packed icebergs. These animals are already widespread in the park. Others—moose and coyotes—are common in some places, absent in others. Scarce or absent here now, but not expected eventually, are Sitka black-tail deer, beavers, lynx, and snowshoe hares. Capable of flight, birds do not experience ice and open water as barriers to recolonization.

Human History

Tlingit Indians were the original inhabitants of Glacier Bay and still consider it their ancestral home. Hunters and gatherers of salmon, seals, berries and roots, they were driven from the bay by advancing glaciers during the Little Ice Age. Naturalist and adventurer John Muir is credited with discovering the bay in 1879, and tourism to this land of ice and snow began soon after. Pioneering homesteaders began farming in Gustavus around 1923, when fish canneries and salteries dotted the region. Though a few hardy men and women have chosen to live in Glacier Bay and on the outer coast in times past, the area remains largely isolated and undeveloped.

Glacier Bay

Glacier Bay National Park and Preserve
Alaska

National Park Service
U.S. Department of the Interior

A park concession tour boat will drop off and pick up campers. Brian Sudeman

Photography in this wet but cloudy-bright landscape poses special challenges. Ruth and Louis Kirk

The park can be experienced by kayak or cruise ship. Chad Soiseth

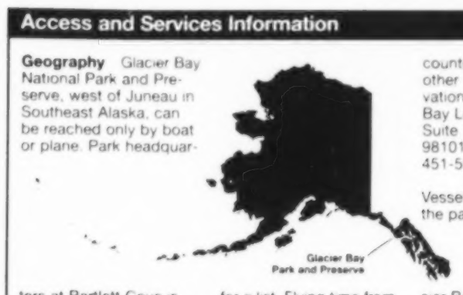
Mountaineering and glacier travel require special skills and equipment. Tom Bean

One last itinerary check in the backcountry before the pilot leaves. Ruth and Louis Kirk

Extensive open country and glaciers attract campers to Glacier Bay. Tom Bean

Access and Services Information

Geography Glacier Bay National Park and Preserve, west of Juneau in Southeast Alaska, can be reached only by boat or plane. Park headquarters at Bartlett Cove is 65 miles from Juneau. It is an additional 55 miles from Bartlett Cove to tidewater glaciers.



Concession Services Travel options from mid-May through September include scheduled and charter air services, tour boats, cruise ships, and charter boats. Some 50 companies provide services in the park; write for a list. Flying time from Juneau to Gustavus is about 30 minutes.

Lodging, groceries, a restaurant, and services are found at Gustavus. Bus or taxi service from Gustavus to the park is available.

At Bartlett Cove, Glacier Bay Lodge offers lodging, food service, fuel, a daily boat tour, backcountry drop-off, and other services. For reservations write: Glacier Bay Lodge, 520 Pike St., Suite 1610, Seattle, WA 98101; or call 1-800-451-5952.

Vessels based outside the park also tour Glacier Bay. Many large cruise ships and smaller tour vessels schedule a day in the bay in their Southeast Alaska itineraries. Charter boats offer many services. Kayak rentals are available.

There are guided kayak and backpacking trips, raft trips down the Alsek River, hunting and fishing guides, and lodging in the preserve.

General Park Information The park's visitor center, located upstairs in Glacier Bay Lodge, has an information desk, interpretive sales area, and auditorium. Exhibits illustrate natural and human history. The free park newspaper, *The Fairweather*, offers articles on local subjects. *Glacier Bay*, the official national park handbook, and other publications are for sale by the Alaska Natural History Association. Write to the park address for a list of references, maps, charts, and videos.

Exhibits near the dock highlight marine natural history and Tlingit culture. Three miles of maintained trails wind through rainforest and along the beaches. Park naturalists present evening programs and films daily in the auditorium, lead hikes in the forest and along the shore, and give talks on tour boats and cruise ships entering Glacier Bay.

Camping and Backcountry Use Campers are required to attend a camper orientation given at the visitor information center. A free campground (14-day limit) with firewood, bear-resistant food caches, and warming hut is at Bartlett Cove. No reservations are needed.

Access to the backcountry generally requires a drop off by tour boat or float plane. Filling out a backcountry use permit at Bartlett Cove before departure is required.

Kayaking the shoreline is often the easiest way to get around. There are no backcountry trails, but beaches, recently deglaciated areas, and alpine meadows offer excellent hiking. Backcountry users should be self-sufficient and fully equipped and provisioned. Cook stoves are necessary because wood is scarce and wet.

Permits are required for float trips on the international Tatshenshini-Alsek River. Write: Yakutat Ranger Station, P.O. Box 137, Yakutat, AK 99689; or call 907-784-3295 or 907-784-3370.

Boating Vessel permits are required before entering Glacier Bay from June 1 to August 31. To obtain permits, write to the park address; call 907-697-2627; or contact VHF radio—KWM 20 BARTLETT COVE. Reservations are recommended. Boating information is available at the visitor information station near the Bartlett Cove dock.

Glacial sedimentation and rapid land rise cause annual changes in water depth. Nautical charts quickly become outdated—use special care when navigating. Maintain a ¼ mile distance from tidewater glaciers. Waves from calving ice can swamp skiffs or kayaks. Bergs frequently turn over or split apart; give them a wide berth.

Fishing Fishing can be good for halibut, Dolly Varden, cutthroat trout, and salmon; an Alaska fishing license is required.

Precautions

Weather Long periods of rainy, overcast, and cool weather are normal in Southeast Alaska. Summer daytime temperatures are usually 45-65°F, but nights may cool to near freezing. To protect against hypothermia a hat, gloves or mittens, and rain gear are essential. Sturdy, waterproof footgear is desirable.

Bears Black and brown/grizzly bears are wild animals and should always be considered dangerous. When hiking, lessen your chances of an encounter by watching for bears and bear sign, making noise, traveling in groups, and avoiding travel at night.

Food, trash, and cooking gear must be stored properly. Avoid taking odorous foods. Bear-resistant food canisters are required in the non-forested areas of Glacier Bay and are available for loan. Photograph bears with a telephoto lens. A close approach is dangerous.

Insects Mosquitos and biting flies may make repellent necessary.

Giardia Even though the water looks clear, it may contain organisms that cause a debilitating intestinal disorder. Water should be boiled vigorously for at least one minute, filtered, or chemically treated.

Regulations

Natural Features Do not destroy, injure, or remove plants, rocks, shells, or other features. The harassing, injuring, or killing of any wildlife is prohibited by law. Help wildlife remain wild; never feed any animal, including squirrels and gulls.

Closures Some areas are closed or restricted because of bears, nesting bird colonies, feeding humpback whales, or other wildlife activity. Check on closures at Bartlett Cove before heading up the bay.

Pets Pets must be leashed or physically restrained at all times. They are prohibited in the backcountry.

Firearms Firearms are prohibited in Glacier Bay. They may be secured at Bartlett Cove for the duration of your stay. They are allowed only in the Preserve and the park addition. Hunting is prohibited except in the Preserve with an Alaska hunting license.

More Information
Write: Superintendent, Glacier Bay National Park and Preserve, P.O. Box 140, Gustavus, AK 99826-0140; or call 907-697-2230.

Email: glba_administration@nps.gov. Internet: www.nps.gov/glba.

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